No. 08-

IN THE

Supreme Court of the United States

FRANKLIN COUNTY POWER OF ILLINOIS, LLC, FORMERLY KNOWN AS ENVIROPOWER OF ILLINOIS, LLC; ENVIROPOWER, LLC; AND KHANJEE HOLDING (US), INC.,

Petitioners,

v.

SIERRA CLUB,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Seventh Circuit erred in holding that an organization has standing under the citizen suit provision of the Clean Air Act ("CAA") to seek an injunction against the construction of a power plant and, absent any agency determination, effectively to supplant the jurisdiction vested by Congress in the agency, without the citizen suit plaintiff establishing that the emission limitations in the existing permit pose a realistic threat of injury to its members' interests and without proving that a new permit would alleviate its members' concerns.

PARTIES TO THE PROCEEDING

All parties to the proceeding are identified in the caption.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioners state that EnviroPower, LLC is a Kentucky limited liability company, with no parent company. No publicly held corporation owns 10 percent or more of its stock.

Franklin County Power of Illinois, LLC, f/k/a EnviroPower of Illinois, LLC is an Illinois limited liability company. EnviroPower, LLC is its parent company, owning 100 percent of its stock. No publicly held corporation owns 10 percent or more of its stock.

Khanjee Holding (US), Inc. has no parent company, and no publicly held corporation owns 10 percent or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Franklin County Power of Illinois, LLC, formerly known as EnviroPower of Illinois, LLC, EnviroPower, LLC, and Khanjee Holding (US), Inc. respectfully petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-32a, is reported at 546 F.3d 918. Its decision denying the petition for rehearing and rehearing en banc, *id.* at 69a-70a, is unreported. The opinion of the district court, *id.* at 33a-68a, is unreported.

JURISDICTION

The court of appeals issued its judgment and opinion on October 27, 2008. Pet. App. 1a-32a. A timely petition for rehearing and rehearing en banc was denied on December 19, 2008. *Id.* at 69a-70a. On February 25, 2009, Justice Stevens extended the time for filing this petition to and including April 18, 2009, which is a Saturday. Pursuant to Sup. Ct. R. 30.1, the petition is being timely filed on Monday, April 20, 2009. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2 of the United States Constitution, which provides:

> The judicial Power shall extend to . . . Cases . . . [and] Controversies . . . .

42 U.S.C. § 7604, the citizen suit provision of the Clean Air Act ("CAA"), which provides:

> (a) . . . [A]ny person may commence a civil action on his own behalf . . .
>
> (3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under [42 U.S.C. §§ 7470 et seq.] (relating to significant deterioration of air quality) . . . or who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of any condition of such permit.

STATEMENT OF THE CASE

The decision below conflicts with this Court's interpretation of Article III of the Constitution, which requires a plaintiff who seeks injunctive relief to present concrete proof of a realistic threat of future injury and to demonstrate that it is likely, and not merely speculative, that the relief sought will redress the specific injury alleged. The court of appeals diluted these requirements by holding that respondent has standing to seek an injunction against the construction of a power plant on the ground that the construction permit has automatically expired and a new permit must be obtained, even though the organization has not established that the emission limitations in the existing permit pose a realistic threat of injury to its members and it is wholly speculative whether (1) the emission limitations in a new permit would be more stringent than those of the existing permit, and (2) any change in the emission limitations would alleviate the alleged threat of injury.

This holding represents a significant departure from this Court's Article III standing principles in the citizen suit context. By relying on respondent's mere assertion of harm to aesthetic and recreational interests and a chain of speculation, the court of appeals ignored and failed to hold respondent to the specific showings and burdens of proof that this Court has set forth in its standing decisions. This analysis is unsound, reflects fundamental confusion about the application of standing principles in the citizen suit context, and warrants this Court's review.

This holding also presents a recurring issue of national importance because a dilution of the Article III standing requirements in this context will invite private groups to bring suit any time there is any conceivable issue with respect to a permit, thereby clogging the courts with questionable citizen suits that are calculated to disrupt construction rather than hold responsible actual violators of environmental standards. This will not only prevent needed and beneficial energy plants from being built, but will also shift the enforcement of permit requirements to these groups and away from the federal and state environmental agencies to whom Congress and state legislatures have delegated responsibility to protect the environment.

A. Statutory Background.

Congress enacted the Clean Air Act ("CAA") in order "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1). To accomplish these goals, the CAA includes provisions designed to prevent significant deterioration of air quality. *Id.* § 7470-7492. Among these, 42 U.S.C. § 7475(a)(1) provides that no "major emitting facility" can be

constructed after August 7, 1977 unless "a permit has been issued for such proposed facility in accordance with this part setting forth emission limitations for such facility." The emission limitations set forth in the permit (called a "PSD permit") must reflect "the best available control technology [BACT] for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility." *Id.* § 7475(a)(4).

The federal Environmental Protection Agency ("EPA") has delegated to the Illinois Environmental Protection Agency ("IEPA") the authority to issue PSD permits in Illinois, although EPA retains ultimate authority over the permits. The permitting process is lengthy and complex, requiring applicants to expend significant time and resources to submit detailed analyses. Interested persons have a full opportunity to participate in the process through a required public hearing at which they may appear and submit written or oral presentations. *Id.* § 7475(a)(2).

Once a PSD permit is issued, EPA regulations provide that it "become[s] invalid if construction is not commenced within 18 months after receipt of such approval, if construction is discontinued for a period of 18 months or more, or if construction is not completed within a reasonable time." 40 C.F.R. § 52.21(r)(2). Congress has defined commencement of construction to mean that the permit-holder has either "begun, or caused to begin, a continuous program of physical on-site construction of the facility" or "entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of construction of the facility to be completed within a reasonable time."

42 U.S.C. § 7479(2)(A). The 18-month period may be extended "upon a satisfactory showing that an extension is justified." 40 C.F.R. § 52.21(r)(2).

B. Factual Background.

Petitioners are experienced developers of electric power plants in the United States and elsewhere. They have built numerous power plants that are currently in operation. This case concerns their efforts to build a coal-fired power plant using state-of-the-art CFB (circulating fluidized-bed) clean-coal technology at the site of a former coal mine in Benton, Illinois. Such power plants are technologically complex projects that require extensive planning and customized design work.

On August 15, 2000, after conducting a detailed feasibility study, petitioners filed an application with the IEPA for a PSD permit to build the Benton power plant. Pet. App. 37a.[1] The IEPA conducted a comprehensive review of the application and a public hearing was held on May 8, 2001. Respondent Sierra Club did not appear at the hearing, file any submissions with the IEPA, or participate in the permitting process in any way. *Id.*

On July 3, 2001, IEPA issued a PSD permit for the plant. Pet. App. 37a. Petitioners worked toward completion of the facility by "obtain[ing] an engineering report and a scoping study," "working on a boiler design" and "procur[ing] necessary resources." *Id.* at 38a. In December 2002, petitioners entered into an agreement with an engineering and construction firm concerning construction of the plant. *Id.* at 38a-42a.

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[1] These facts are set forth in the district court's opinion.

On September 30, 2004, an IEPA inspector visited the plant site and "found that construction had commenced." Pet. App. 43a. On November 19, 2004, however, the IEPA notified petitioners that it had made a "preliminary finding" that the PSD permit had expired. *Id.* at 44a. This notification provided petitioners with the opportunity to refute the preliminary finding by submitting documentation requested by the IEPA. *Id.*; see 42 U.S.C. § 7414(a) (authorizing EPA Administrator or authorized representative to issue formal information requests). The EPA also requested that petitioners provide it with information concerning the status of the permit. Pet. App. 44a. Petitioners disputed the IEPA preliminary finding and fully complied with the information requests by timely submitting several thousand pages of documentation to the IEPA and EPA. *Id.*

On January 5, 2005, before petitioners had completed their responses to the information requests, respondent notified petitioners and the agencies of its intent to file suit under the CAA's citizen suit provision. Pet. App. 44a; see 42 U.S.C. § 7604(b) (requiring potential citizen suit plaintiffs to provide the alleged violator and agencies with 60 days advance notice of intent to sue). The instant lawsuit was then filed on May 20, 2005. Pet. App. 44a. The filing of the Sierra Club suit chilled all further agency action with respect to the PSD permit. In particular, the IEPA has never made a final determination concerning the status of the permit. *Id.*[2]

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[2] Pursuant to 42 U.S.C. § 7661a(b)(5)(B) & (C), petitioners were required to file for renewal of their PSD permit after five years and to update their BACT and air modeling analyses. They submitted a timely application for a renewal permit in 2006, but the IEPA did not act upon it.

C. Proceedings Below.

Respondent's Lawsuit. Respondent's citizen suit alleged that petitioners propose to construct a power plant without a valid PSD permit. See 42 U.S.C. § 7604(a)(3) (providing for citizen suit "against any person who proposes to construct or constructs any new or modified major emitting facility without a [PSD] permit"). Respondent sought declaratory relief, an injunction requiring petitioners to stop construction until they have a valid PSD permit, fines, costs, and attorneys' fees. Pet. App. 33a-34a.

Petitioners filed a motion to dismiss and a motion for summary judgment, arguing, *inter alia*, that respondent lacked standing to sue under Article III of the Constitution. In response to petitioners' motion for summary judgment on the standing issue, respondent submitted the affidavit of one of its members, Barbara McKasson, who alleged that she and her family have taken trips to the Rend Lake area every other year since 1987 to fish and to engage in other recreational activities; that she intends to continue taking trips to the area; and that the Rend Lake area is less than three miles from the proposed plant. Affidavit of Barbara McKasson, ¶¶ 4, 6, 8 (May 2, 2006) ("McKasson Aff.").[3] Ms. McKasson then set forth the emission limitations contained in petitioners' PSD permit, the emission limitations contained in two other PSD permits issued by the IEPA for coal-fired power plants in 2003 and 2005 (which she asserted were "lower than the rates established by IEPA in the EnviroPower PSD

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[3] Ms. McKasson's affidavit is document number 93 in the district court record. As the district court acknowledged, Ms. McKasson did not even know about respondent's lawsuit until after it was filed. Pet. App. 52a.

permit"), and alleged that "[b]ecause the [Benton] Power Plant would be operating under an expired permit, the [Benton] Power Plant will emit pollutants in excess of the emission rates now considered acceptable by the IEPA." *Id.* ¶¶ 13-18.

McKasson then alleged in her affidavit that "[i]f the [Benton] Power Plant is constructed without a valid PSD permit," her "use and enjoyment of the Rend Lake area will be impaired" because of negative aesthetic effects and her concerns about adverse health effects, which would "likely reduce, or eliminate altogether, [her] trips to Rend Lake." *Id.* ¶ 19. She also alleged that "[i]f the Power Plant is constructed as proposed," she will "reduce the consumption of fish" from a pond at her home (approximately 45 miles from the proposed plant) due to concerns about mercury accumulation. *Id.* ¶ 21. Finally, she alleged that the requested injunction would "address[]" her concerns because "[i]f Defendants then obtained a new PSD Permit permitted under current standards, [she] and [her] family would be exposed to less harmful air pollution at Rend Lake and at [her] home." *Id.* ¶ 22.

The district court ruled on the dispositive motions without ever holding an evidentiary hearing or even permitting oral argument.

District Court Decision. The district court held that respondent has Article III standing to bring this suit based on the standards for organizational standing established in *Friends of the Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000), and the standards for individual standing set out in *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 (1992). See Pet. App. 48a-52a.

With respect to the requirement that respondent establish "an injury in fact to at least one of its members," the district court held that respondent satisfied this requirement because Ms. McKasson alleged in her affidavit that "if the defendants build the Plant without the appropriate permit, the resulting levels of pollution from the operating Plant will directly affect her use and enjoyment of the Rend Lake area." Pet. App. 50a. No scientific or other objective evidence was ever introduced to corroborate Ms. McKasson's unsupported assertions. Nonetheless, the district court further relied on McKasson's statement "that the pollution that will be generated by the Plant constructed without an appropriate permit will also affect her use and enjoyment of her own property 45 miles from the proposed Plant site." *Id.* The district court concluded that these statements establish "an injury in fact of a Sierra Club member that is imminent and not conjectural or hypothetical." *Id.*

With respect to the requirement that respondent establish "a causal connection between McKasson's injury and pollution that will imminently emit from the Plant," Pet. App. 50a, the district court held that respondent satisfied this requirement because "McKasson stated in her affidavit that levels of those pollutants allowed by the PSD permit the Sierra Club believes has expired would cause the imminent injury of which she complains," *id.* at 51a. The court found that these statements establish that "McKasson's injury is fairly traceable to the defendants' construction of the Plant allegedly without an appropriate permit." *Id.*

With respect to the requirement that McKasson's purported injury be redressable by the remedy that she seeks, the district court held that respondent

satisfied this requirement because "McKasson stated that PSD permits for power plants issued after the defendants' PSD permit contain lower BACT [best available control technology] emission levels (as they should since technology tends to make advancements, not regressions)" and "that if the Court were to halt construction of the Plant until the defendants obtained a new PSD permit, the BACT emission levels for the new PSD permit would be lower and her exposure to harmful pollutants at Rend Lake and at her home would be lessened." Pet. App. 51a. At no time, however, did Sierra Club or Ms. McKasson ever specify which pollutant would cause what harm.[4]

The district court also determined that the PSD permit had expired and made other rulings that are not relevant here. It enjoined petitioners "to stop actual construction of the Plant until they have obtained a valid PSD permit" and deferred consideration of a fine and attorneys' fees to a later date. Pet. App. 67a-68a.

Seventh Circuit Decision. The Seventh Circuit affirmed. With respect to standing, the Seventh Circuit upheld the district court's determination that

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[4] Given its interpretation of the standing requirements and Ms. McKasson's subsequent plaintiff status, the district court did not address the standing claim of Verena Owen, another Sierra Club member. Pet. App. 51a n.1. Ms. Owen exercised a similar lack of diligence in supporting her standing claim with scientific fact and evidence as Ms. McKasson; she merely asserted that she lives near Chicago (approximately 350 miles from the proposed plant) and was concerned about the effects of the plant's emission on the air quality in the greater Chicago area. Even Ms. McKasson's patently insubstantial aesthetic and recreational interests were stronger than Ms. Owen's, and Ms. McKasson therefore served as the sole standing plaintiff for the district court.

respondent has standing through its member, Ms. McKasson.

The Seventh Circuit agreed that Ms. McKasson satisfied the injury in fact requirement because she states in her affidavit "that she will experience diminished aesthetic and recreational value if the Company constructs and operates the power plant under the 2001 PSD permit." Pet. App. 8a; see also *id.* (noting that "[i]f the proposed plant is built, McKasson will be exposed to emissions from the plant"). The court of appeals further noted that McKasson asserted in her affidavit that she will cease visiting the area "if the Company builds the plant under the 2001 permit . . . because the pollutants emitted based on the permit will harm her." *Id.*

With respect to the causation or traceability requirement, the Seventh Circuit held that this requirement was satisfied because "under the 2001 PSD permit the proposed plant will emit airborne pollutants . . . three miles from Rend Lake" and McKasson alleges that "these pollutants and the resulting decrease in visibility will negatively impact her enjoyment of the lake." Pet. App. 10a-11a. The court of appeals acknowledged that "no one knows the ultimate magnitude of McKasson's injury," but held that this does not matter because "[w]e do know . . . that the plant will release some pollutants and that McKasson believes these pollutants will ruin her ability to enjoy Rend Lake and taint the surrounding area." *Id.* at 11a; see also *id.* at 12a (finding that McKasson's injury is "fairly traceable to the plant" because it "stems from the emissions of the Company's proposed plant").

With respect to redressability, the Seventh Circuit held that this requirement was satisfied because it is

"reasonable to believe that any new permit the Company obtains will have tougher emission standards than the 2001 PSD permit." Pet. App. 13a. The court of appeals based this "reasonable belief" on the fact that "pollution control technology tends to improve over time" and that "the record indicates that the IEPA issued PSD permits in 2003 and 2005 for similar coal-fired power plants with emission standards that were significantly more stringent than those in the Company's 2001 permit." *Id.* at 12a-13a. The court of appeals further held that it "need not determine exactly how much tougher those standards will be" because "[i]t is enough that [McKasson's] concerns will be addressed if more stringent emission standards are imposed than those required under the 2001 permit, even though the plant will still emit some pollutants if the Company obtains a new PSD permit." *Id.* at 13a.

The Seventh Circuit denied rehearing and rehearing en banc.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT.

The decision below merits review because it conflicts with this Court's constitutional standing jurisprudence requiring a plaintiff to allege "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 342 (2006) (internal quotation omitted). See Sup. Ct. R. 10(c) (a consideration favoring review on certiorari is where a federal court of appeals "decided an important federal question in a way that conflicts with relevant decisions of this Court").

Parties seeking to "invoke the power of federal courts" must satisfy the threshold requirement imposed by Article III of the Constitution that they "must allege an actual case or controversy." *O'Shea* v. *Littleton*, 414 U.S. 488, 493 (1974) (citing cases). This "limitation 'is founded in concern about the proper – and properly limited – role of the courts in a democratic society.'" *Summers* v. *Earth Island Inst.*, 129 S. Ct. 1142, 1148 (2009) (quoting *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975)). Specifically, the case or controversy requirement restricts the judicial power "to the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law." *Id.*[5]

"[A]n essential and unchanging part of th[is] case-or-controversy requirement" is the doctrine of standing. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citing *Allen* v. *Wright*, 468 U.S. 737, 751 (1984)). This Court has defined the "irreducible constitutional minimum of standing" as containing three elements. First, the plaintiff must have suffered an "injury in fact": an "invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.* at 560 (internal citations and quotation marks omitted). Second, "there must be a causal connection between the injury and the conduct complained of," *i.e.*, "the injury has to be fairly . . . trace[able] to the challenged action of the defendant." *Id.* (internal quotation

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[5] Because Article III is so fundamental to a proper separation of powers under the Constitution, this Court has granted certiorari to address Article III standing questions even in the absence of a clear conflict among the circuits. *See, e.g.*, *Summers*, 129 S. Ct. 1142.

marks omitted; omission and alteration in original). Third, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561 (internal quotation marks omitted). Together, these requirements compel plaintiffs to "demonstrate a 'personal stake in the outcome' in order to 'assure that concrete adverseness which sharpens the presentation of issues' necessary for the proper resolution of" important questions of federal law. *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 101 (1983) (quoting *Baker* v. *Carr*, 369 U.S. 186, 204 (1962)). It is the plaintiff's burden to establish standing. *Lujan*, 504 U.S. at 561 ("The party invoking federal jurisdiction bears the burden of establishing these elements.").

An organization has standing to sue if (1) one or more of its members "would otherwise have standing to sue in their own right" under the standards set forth in *Lujan*; (2) "the interests at stake are germane to the organization's purpose"; and (3) "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc.* v. *Laidlaw Env'l Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000).

The Seventh Circuit has departed from core components of this framework. Although the court of appeals paid lip service to the foregoing principles, see Pet. App. 6a-7a, it plainly ignored them in holding that respondent has standing to challenge the validity of petitioners' PSD permit and seek an injunction that will delay construction of the plant. Before turning to the court of appeals' flawed application of the standing requirements, it is important to understand what respondent does *not* claim in this lawsuit. Respondent does not claim that petitioners have violated any environmental law or

any emission limitation of their PSD permit, or that its members fear, based on evidence, that petitioners will commit any such violation in the future. Nor has it challenged any aspect of the IEPA's actions in approving the PSD permit, including its establishment of the permit's emission limitations in accordance with the "best available control technology" standard, see 42 U.S.C. § 7475(a)(4). As a result, respondent makes no claim that a timely constructed coal-fired power plant built in conformance with the permit would violate any law or environmental standard. With this background in mind, it is clear that the court of appeals' analysis of the *Lujan* factors is unsound.

First, the court of appeals' determination that respondent, through its member McKasson, satisfied the "injury in fact" requirement conflicts with this Court's decisions. McKasson's alleged "injury" is harm to her aesthetic and recreational interests that allegedly will occur if petitioners' plant is built under the conditions of the PSD permit. To be sure, this Court has held that harm to the aesthetic and recreational interests of environmental plaintiffs who use affected areas can constitute "injury in fact." See *Laidlaw*, 528 U.S. at 183; *Sierra Cluo* v. *Morton*, 405 U.S. 727, 734-35 (1972). But it has also held that in order to serve as the basis for injunctive relief, a plaintiff must show that she faces a "realistic threat" of the alleged future injury and that mere "'subjective apprehensions'" that such an injury will occur are insufficient to support standing. *Laidlaw*, 528 U.S. at 184; *Lyons*, 461 U.S. at 107 n.8 (evaluating the "reasonableness of [the plaintiff's] fear" of future injury); *see also* 461 U.S. at 101 ("Abstract injury is not enough.").

Here, McKasson's feared injuries to her aesthetic and recreational interests are rooted in "subjective apprehensions" that are neither "realistic" nor "reasonable." This is not a case like *Laidlaw*, where the defendant has engaged in "continuous and pervasive illegal discharges of pollutants," 528 U.S. at 184, or a case like *Morton*, where the plaintiff has asserted under the Administrative Procedure Act that the approval of the project contravened federal environmental laws, 405 U.S. at 730 & n.2. As noted, respondent does not claim that petitioners have violated any environmental standard, that McKasson or any of its other members fear that they will do so in the future, or that the IEPA's approval of the permit was in any way improper. Instead, McKasson's alleged fears of injury stem from the emission limitations that the IEPA, after extensive analysis and public comment, approved for the PSD permit under the governing standard set by Congress. In other words, her fears stem from emission limitations that the federal and state environmental agencies deemed sufficient to protect air quality under the CAA.[6]

Personal fears of emissions that *comply* with federal clean air standards, however, cannot be credited as a "realistic" or "reasonable" basis for standing. Such fears are a classic example of fears based on "subjective apprehensions," *Lyons*, 461 U.S. at 107 n.8, that are – at best – "conjectural" or "hypothetical," *Lujan*, 504 U.S. at 560 (internal quotation marks omitted). At the very least, the court of appeals' holding that subjective fears based

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[6] The reasonableness of McKasson's fears is further undercut by the petitioners' representations to the courts below that the plant has been designed "to produce emissions below permitted levels." Pet. App. 11a.

on permissible emission levels can support standing undermines the environmental protection scheme that Congress has established and permits judicial second-guessing of the considered judgment of the expert agencies. See *Mobil Oil Exploration & Prod. Se. Inc.* v. *United Distrib. Cos.*, 498 U.S. 211, 231 (1991) (declining to "second-guess" agency's "reasoned determination" in a "complex area"); *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 297 (2002) (courts cannot "second-guess" agency judgments "balanc[ing] the competing policies"); *Heckler* v. *Chaney*, 470 U.S. 821, 831-32 (1985) ("The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.").

In addition, under the Seventh Circuit's approach to analyzing injury in fact, citizen suits can be predicated on collateral attacks by private interest groups against the substance of state-issued permits – a result that several other federal courts have held impermissible. See, *e.g.*, *Nat'l Parks Conservation Ass'n, Inc.* v. *TVA*, 175 F. Supp. 2d 1071, 1079 (E.D. Tenn. 2002) (finding "no evidence in the language of the Clean Air Act to indicate that Congress intended that citizen suits could be used to collaterally attack" the emission standards in state permits); *cf. Families Concerned About Nerve Gas Incineration* v. *U.S. Dep't of the Army*, 380 F. Supp. 2d 1233, 1258 (N.D. Ala. 2005) (citizen suit provision of the Resource Conservation Recovery Act does not provide court with "jurisdiction to hear collateral challenges to the facility's [state-issued] permit"). As these courts correctly recognized, such collateral attacks are an improper attempt to disrupt and delay construction of facilities that the relevant public officials have deemed compliant with federal standards. The court of appeals' holding that

respondent has standing based on alleged injuries that arise from the emission limitations in the PSD permit is particularly troubling because respondent had a full opportunity to participate in the lengthy IEPA permitting process, but chose not to do so.

Second, even if the Seventh Circuit properly applied this Court's decisions in finding that respondent satisfied the "injury in fact" requirement, its determination that respondent satisfied the causation and redressability requirements does serious violence to this Court's decisions. See *Allen* v. *Wright*, 468 U.S. 737, 753 n.19 (1984) (noting the frequent overlap between these two requirements). Because respondent relied on McKasson's alleged aesthetic and recreational interests as the Article III injury, the rest of the standing analysis must be grounded in that injury. The Seventh Circuit misapplied this Court's standing decisions, however, in finding that the causation and redressability requirements are satisfied with respect to that alleged injury.

To satisfy the causation requirement, respondent must demonstrate "a causal connection between the injury and the conduct complained of." *Lujan*, 504 U.S. at 560. The Seventh Circuit held that this requirement was satisfied because "under the 2001 PSD permit the proposed plant will emit airborne pollutants" that McKasson alleged would harm her aesthetic and recreational interests. Pet. App. 10a-11a; see also *id.* at 12a (finding that McKasson's injury is "fairly traceable to the plant" because it "stems from the emissions of the Company's proposed plant"). Under this analysis, however, the threatened harm to McKasson's aesthetic and recreational interests is traceable to the IEPA's issuance of the PSD permit in the first place with the specified

emission limitations, not to the conduct that respondent complains of here – petitioners' intent to build under that permit. In other words, the injury that McKasson alleges would have arisen even from timely construction of the plant pursuant to the PSD permit, and therefore is not fairly traceable to the allegedly expired permit.

Respondent faces even greater problems with respect to redressability. The relief it seeks – and obtained below – was not an absolute injunction against construction of the plant, but instead an injunction that prevents petitioners from building the plant until they obtain a new permit. Pet. App. 67a (enjoining petitioners "to stop actual construction of the Plant until they have obtained a valid PSD permit"). The Seventh Circuit held that the redressability requirement is satisfied because it is "reasonable to believe that any new permit the Company obtains will have tougher emission standards than the 2001 PSD permit." *Id.* at 13a; see also *id.* (noting that McKasson's "concerns will be addressed if more stringent emission standards are imposed"). In other words, the court of appeals' finding of redressability is based on the hypothetical possibility of a difference between the emission limitations in the PSD permit and a new permit, and the possible real-world effect of any such incremental difference.

This reasoning cannot be squared with this Court's holdings that "it must be *likely*, as opposed to merely *speculative*, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (internal quotation marks omitted; emphases added); see also *Allen*, 468 U.S. at 751 (redressability requires that the plaintiff's alleged injury is "*likely* to be redressed by the requested relief") (emphasis added); *Larson* v.

Valente, 456 U.S. 228, 243 n.15 (1982) (the redressability requirement is satisfied when a plaintiff "shows that a favorable decision *will relieve* a discrete injury to himself") (emphasis added). The Seventh Circuit's finding that the requested injunction will redress McKasson's alleged injury relies on a chain of speculative inferences – an approach that this Court has held inconsistent with Article III. See *Summers*, 129 S. Ct. at 1150 (rejecting theory of Article III injury that required multiple assumptions).

The Seventh Circuit's first speculative inference is that a new permit for the Benton plant would have tougher emission standards. It is true, as a broad generalization, that pollution-control technology is improving. But coal-fired power plants are very complex, customized projects with numerous variables, including different designs, different technologies, and different types of coal inputs. As a result, the determination of appropriate emission limitations for such plants under the governing BACT standard involves a highly individualized, case-by-case inquiry. Accordingly, the question of what emission limitations the IEPA would establish for a new PSD permit for the Benton plant, and how those would compare to the limitations in the 2001 permit, is inherently and hopelessly speculative.

Under this Court's precedent, however, federal courts may not speculate that state policymakers will make a particular decision in the future to establish standing. *DaimlerChrysler*, 547 U.S. at 346. Instead, when an element of standing "'depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict'" – as the redressability element does under the Seventh Circuit's reasoning –

it is the plaintiff's burden "to adduce facts showing that those choices . . . will be made." *Lujan*, 504 U.S. at 562 (quoting *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 615 (1989) (Kennedy, J.)).

Here, no such facts were adduced to establish how the IEPA would set the emission limitations in a new permit for the Benton plant. The Seventh Circuit based its inference that new emission limitations would be more stringent (by some unspecified amount) on the general trend of improving technology, Pet. App. 12a, but this reliance was improper under this Court's recent decision in *Summers*, 129 S. Ct. 1142. In *Summers*, this Court rejected the claim that the injury in fact element of standing could be satisfied based on "a statistical probability" that at least one of an organization's members suffered an injury, rather than on individualized proof of injury. *Id.* at 1151-52. Here, the Seventh Circuit effectively relied on a statistical probability that any given PSD permit issued today would have more stringent emission limitations than a permit issued in 2001, without any individualized proof that this would likely be true with respect to the Benton permit. Under *Summers*, however, elements of standing cannot be satisfied based on general probabilities; individualized proof is required.[7]

Even if a new permit for the Benton plant likely would contain more stringent emission limitations, the Seventh Circuit's further inference that this

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[7] The Seventh Circuit's apparent reliance on statements in McKasson's affidavit concerning the emission limitations contained in two other PSD permits issued by the IEPA in 2003 and 2005, Pet. App. 13a, ignores that each coal-fired power plant has unique characteristics and that these two permits therefore shed no light on the IEPA's application of the BACT standard over time or to any particular plant.

would redress the specific injury in fact that respondent alleges – harm to McKasson's aesthetic and recreational interests – is even more speculative. It is pure conjecture whether any incremental reduction in emission levels from a new permit would even be perceptible to McKasson. See *Lujan*, 504 U.S. at 566 (plaintiff must make "a factual showing of *perceptible* harm") (emphasis added). Even if perceptible, it is wholly speculative whether any such reduction would be of sufficient magnitude to eliminate or even reduce McKasson's aesthetic and recreational concerns. Given her categorical concerns about the effects of the emissions from the Benton plant, as well as her concerns about the presence of the plant itself, it is far from "likely" that a new permit would alleviate her alleged fears that prompted this lawsuit.[8]

In sum, in contravention of the principles that this Court set forth in *Summers*, *Lujan*, *Allen*, and other decisions, the court of appeals improperly relied on a chain of speculation to conclude that the injunction respondent seeks would remedy any alleged injury that is fairly traceable to the expired permit. See *Lujan*, 504 U.S. at 566 ("[s]tanding is not 'an ingenious academic exercise in the conceivable'") (quoting *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688 (1973)); see also *Ogden Projects, Inc.* v. *New Morgan Landfill Company, Inc.*, 911 F. Supp. 863,

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[8] McKasson asserts in her affidavit that her concerns would be addressed if she and her family were exposed to "less" air pollution. McKasson Aff. ¶ 22, but this conclusory assertion cannot credibly establish that *any* decrease in an emission limitation for *any* pollutant – no matter how minute in absolute terms or in terms of human perceptibility – would redress her alleged injuries.

869-70 (E.D. Pa. 1996) (plaintiffs lacked standing to bring claim alleging that landfill owner constructed and operated landfill without requisite CAA permit where they offered "no evidence regarding the magnitude of the diminished air quality nor the specific direct effect, if any, that this diminished air quality will have on their health, environmental and recreational interests"; plaintiffs "summarily conclude that their health, environmental and recreational interests suffer injury, without filling in the blanks").

Moreover, the court of appeals' approach to redressability fundamentally alters the nature of the permits that Congress provided for in the CAA. Power plant builders are willing to undertake the arduous process of obtaining a permit because once the permit process is closed, they can proceed with construction without further regulatory challenges so long as they follow the terms of the permit. But under the Seventh Circuit's approach, private groups can bring endless challenges to issued permits based on improvements in pollution control technology. This wholly undermines the important role that the permitting process plays in ensuring certainty for builders and thereby weakens their incentive to make the necessary investments in the first instance.

Individually and collectively, then, the Seventh Circuit's rulings on the elements of standing represent a significant departure from this Court's holdings and will have significant adverse consequences. By failing to hold respondent to the specific showings and burdens of proof that this Court set out in *Lujan* and underscored in *Summers*, and instead relying on respondent's mere assertion of harm to aesthetic and recreational interests and a chain of speculation, the court of appeals has significantly

diluted the standing requirements in the context of CAA citizen suits, particularly when those suits do not allege any violation or threatened violation of an environmental standard. As demonstrated below, this dilution of Article III standing principles in the citizen suit context ignores the legitimate agenda that Congress has prescribed for citizen suit plaintiffs, which is to support, not supplant, agency authority. As a result, builders of complex energy projects, such as coal-fired power plants, will face the prospect of unbounded lawsuits by private groups such as respondent that assert challenges to their state-issued permits, even when the state and federal agencies have taken no action to invalidate the permits. Accordingly, the court of appeals' misapplication of standing principles established by this Court warrants this Court's review.

II. THE COURT OF APPEALS' STANDING RULING POSES AN ISSUE OF FUNDAMENTAL IMPORTANCE.

The court of appeals' dilution of this Court's standing principles also presents a recurring and "important question" of federal law that warrants this Court's attention. See Sup. Ct. R. 10(c).

The court of appeals' decision, if left standing, will have enormous impact on CAA citizen suits in the Seventh Circuit as well as nationwide. By relaxing the Article III standing requirements in the context of citizen suits seeking injunctions against the construction of power plants based on challenges to the validity of the permits, the court of appeals' decision invites private groups that oppose such plants to sue any and every time there is any conceivable issue with respect to a permit, regardless of whether the issue poses a realistic threat to – or

even has any bearing on – their members' environmental interests.

Such suits do nothing to hold responsible actual violators of environmental laws, but they have at least two significant harmful effects. *First*, the prospect of such lawsuits threatens the entire electric utility industry, which is a cornerstone of the nation's economy. As petitioners learned first-hand in this case, the commencement of litigation is often sufficient to stall projects that have been in the works for years. Indeed, the mere threat of litigation is often sufficient to do so. As a result, the evisceration of Article III standing principles in this context threatens to chill power plant builders from making the enormous investments that are necessary to undertake such projects in the first place, to the detriment of national efforts to develop domestic energy sources that will reduce dependence on foreign sources of energy. Faced with the likelihood of perpetual assaults on their projects arising from complex permitting regimes, few builders will be willing to pursue these projects. These projects, however, are critical to serving our nation's increasing energy needs and without them, the prospects for continued economic growth for future generations are uncertain.

Second, the foregoing chilling effect is a predictable and inevitable consequence of private groups with self-serving agendas performing an enforcement and even prosecutorial role with respect to environmental permits – a practice that the Seventh Circuit's relaxed standing standards invite and facilitate. As Justice Scalia noted in his dissent in *Laidlaw*, the relaxation of standing principles in the context of citizen suits under the environmental statutes has the effect of "turn[ing] over to private citizens the

function of enforcing the law." 528 U.S. at 209; see also *id.* at 197 (Kennedy, J., concurring) ("Difficult and fundamental questions are raised when we ask whether exactions of public fines by private litigants, and the delegation of Executive power which might be inferable from the authorization, are permissible in view of the responsibilities committed to the Executive by Article II of the Constitution of the United States."). National organizations such as respondent "need not look long for an injured member" under the court of appeals' approach, which leaves them free to exercise "significant discretion in choosing enforcement targets" and pursue suits "without meaningful public control." *Id.* at 209 (Scalia, J., dissenting). Given the threat of civil penalties and project-ending injunctions, citizen plaintiffs possess "massive bargaining power" with which to coerce settlements, *id.* at 210 (Scalia, J., dissenting), including in situations where the public agencies would not have deemed their permit claims worth pursuing or even meritorious.

These concerns about the displacement of public enforcement with private enforcement are not theoretical or farfetched: this is precisely what happened here. As noted, neither the IEPA nor the EPA has ever determined that the PSD permit has expired. Moreover, both agencies were actively investigating the validity of the permit at the time respondent filed suit, having requested that petitioners produce thousands of pages of documentation relating to that issue. Those investigations came to an abrupt halt once respondent's suit was filed, as did any possibility of petitioners moving forward with the project in which they had invested years of their time and millions of dollars. Accordingly, this lawsuit is a case study in private interest-driven litigation that

has proceeded without any meaningful public control, yet has resulted not only in an injunction prohibiting the construction of a much-needed and environmentally-sound power facility, but also the prospect of significant civil fines against its proponents.

Under the Seventh Circuit's decision, such suits will inevitably proliferate and more power plant builders will suffer the fate that petitioners have suffered (assuming that potential builders pursue such projects at all). Accordingly, the Seventh Circuit's standing ruling poses a question of fundamental importance that warrants this Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 20, 2009

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
SEVENTH CIRCUIT

No. 06-4045

SIERRA CLUB,
Plaintiff-Appellee,
v.

FRANKLIN COUNTY POWER OF ILLINOIS, LLC,
formerly known as EnviroPower of Illinois, LLC,
EnviroPower, LLC, and Khanjee Holding (US), Inc.,
Defendants-Appellants.

Argued Oct. 29, 2007.
Decided Oct. 27, 2008.
Rehearing and Rehearing
En Banc Denied Dec. 19, 2008

Before BAUER, RIPPLE, and WILLIAMS, Circuit Judges.

WILLIAMS, Circuit Judge.

Franklin County Power of Illinois, LLC, wants to build a coal power plant in southern Illinois. Because the plant will emit a significant amount of air pollution, the Company must first obtain a "Prevention of Significant Deterioration" (PSD) permit from the Illinois Environmental Protection Agency (IEPA), the agency that the federal EPA has designated as the issuer of PSD permits in Illinois. Although the IEPA granted the Company a PSD permit in 2001, the

IEPA has since made a "preliminary determination" that the permit has expired.

Sierra Club is a non-profit environmental organization that sought to enjoin the Company from building the power plant by bringing this suit against the Company, its parent company EnviroPower, LLC, and Khanjee Holding (US), Inc., under a citizen suit provision of the Clean Air Act. Sierra Club alleged that the Company's 2001 PSD permit had expired because the Company had neglected to "commence construction" of the plant within an 18-month window required under the permit. Sierra Club also claimed the permit was invalid under EPA regulations because the Company had discontinued construction of the plant for over 18 months. The district court agreed with Sierra Club on both points and granted summary judgment in its favor. The court also permanently enjoined the Company from building the plant until it obtained a new PSD permit, and the defendants appealed to this court.

We agree with the district court that Sierra Club has standing to pursue this lawsuit and that its claim is ripe and permissible under the Clean Air Act. We also agree that the 2001 PSD permit has expired and that the district court properly granted permanent injunctive relief in favor of Sierra Club. Therefore, we affirm the district court's grant of summary judgment in favor of Sierra Club.

I. BACKGROUND

A. Statutory and regulatory framework

Sierra Club brought this suit under 42 U.S.C. § 7604(a)(3), a citizen suit provision of the Clean Air Act, which provides in relevant part:

> [A]ny person may commence a civil action on his own behalf . . .
>
> (3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under [42 USCS §§ 7470 et seq.] (relating to significant deterioration of air quality) . . . or who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of any condition of such permit.

The parties agree that the coal power plant that the Company seeks to build is a "major emitting facility" that requires a PSD permit. Such a permit contains an emission limitation that is set by the IEPA and represents the "best available control technology" for pollution. *See* 42 U.S.C. § 7475(a).

Once issued, a PSD permit can expire and become invalid in three different ways:

> [a] [I]f construction is not commenced within 18 months after receipt of such approval,
>
> [b] if construction is discontinued for a period of 18 months or more, or
>
> [c] if construction is not completed within a reasonable time.

40 C.F.R. § 52.21(r)(2). The IEPA Administrator "may extend the 18-month period upon a satisfactory showing that an extension is justified," *id.;* otherwise, the PSD permit terminates by "automatic expiration." 40 C.F.R. § 124.5(g)(2) ("PSD permits may be terminated only by recission under § 52.21(w) or by automatic expiration under § 52.21(r)(2).").

B. Factual background

On August 15, 2000, the Company applied to the IEPA for a PSD permit to build a 600 megawatt[1] coal-fired power plant in Benton, Illinois, on land for which it had a 99-year lease. The IEPA concluded the project would be a major air pollution source subject to PSD review. On July 3, 2001, the IEPA issued a PSD permit for the plant. The permit states it will become invalid if:

> construction of CFB [circulating fluidized bed] boilers is not commenced within 18 months after this permit becomes effective, if construction of these boilers is discontinued for a period of 18 months or more, or if construction of these boilers is not completed within a reasonable period of time.

The permit defines "commence" and "construction" in terms of 40 C.F.R. § 52.21(b)(9) and § 52.21(b)(8), respectively, which are provisions we will discuss in more detail later.

On December 2, 2002, the Company entered into an agreement with Black & Veatch (B & V), an engineering and construction company, that required the parties to "work together on an exclusive basis . . . in order to draft and negotiate the EPC [Engineering, Procurement and Construction] Contract." On about December 18, 2002, the Company contracted with Alberici Constructors, Inc., for on-site excavation and foundation work. Alberici was to dig a hole at the site

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[1] Sierra Club claims the permit only authorized a 500 MW, not a 600 MW, facility. Because the defendants lost on summary judgment, we construe all facts in the light most favorable to them. *See Rawoof v. Texor Petroleum Co.*, 521 F.3d 750, 755 (7th Cir.2008).

down to the bedrock and pour concrete to lay part of the foundation for the plant. On January 3, 2003, four Alberici employees began delivering equipment to the site, and five days later, they began excavating.

On February 14, 2003, Alberici stopped the excavation after a dispute arose regarding payment. Alberici's bills after that date include one day where workers showed up but did no work. All other days only include a supervisor's hours spent maintaining a protective barricade around the site.

In July 2004, the Company's landlord had the hole refilled, apparently because the Company did not make a payment on its lease. In September 2004, the Company signed another contract for excavation and concrete work, which began anew on September 29, 2004. An IEPA inspector visited the plant site shortly thereafter and determined that construction had commenced.

In the meantime, co-defendant Khanjee Holding (US), Inc. had obtained an option to buy the Company and all its assets. In June 2003, Khanjee affirmed its obligation to adhere to the Company's contract with B & V. In January 2004, the Company secured a mandate letter from its lead financial arranger indicating that financing for the project was available.

On November 19, 2004, the IEPA notified the Company that it had "made a preliminary finding" that its PSD permit had expired. The Company challenged this preliminary determination and as far as we know, that matter remains pending before the IEPA.

On May 20, 2005, Sierra Club filed this suit, alleging that the 2001 PSD permit had expired and was invalid. The defendants moved to dismiss, claiming that the citizen suit provision of the Clean Air Act did not provide a basis for this suit. They also moved for summary judgment, claiming that Sierra Club lacked standing and that the permit was valid. Sierra Club countered with its own motion for summary judgment.

The district court denied the defendants' motions and found the permit to be invalid. It entered summary judgment in Sierra Club's favor and permanently enjoined the defendants from building the plant until they obtained a valid permit. The defendants then filed this appeal.

II. ANALYSIS

A. Sierra Club had standing.

An organization has standing to sue if (1) at least one of its members would otherwise have standing; (2) the interests at stake in the litigation are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires an individual member's participation in the lawsuit. *See Friends of the Earth, Inc. v. Laidlaw Env'l Servs. (TOC), Inc.*, 528 U.S. 167, 181, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (citing *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977)). The defendants do not seriously contest that Sierra Club satisfies prongs (2) and (3). Sierra Club is a nonprofit organization formed and operated to "preserve, protect, and enhance the natural environment," which is also its stated goal in bringing this lawsuit. The defendants also do not suggest this proceeding re-

quires an individual Sierra Club member to participate; rather, they claim that Sierra Club has not presented an individual member with standing. So the dispute here turns on prong (1).

To have standing, an individual must satisfy three requirements. First, she must have suffered an "injury in fact" that is both (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, the injury must be fairly traceable to the challenged action. Third, it must be likely, not just speculative, that a favorable decision will redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Because these elements "are not mere pleading requirements but rather an indispensable part of the ... case, each element must be supported ... with the manner and degree of evidence required at the successive stages of the litigation." *Id.* at 561, 112 S.Ct. 2130.

To survive a defendant's motion for summary judgment (or to win on a cross-motion for summary judgment), a plaintiff cannot rely on mere allegations but must support each element by specific facts via affidavits or other evidence. *See id.* We review de novo the district court's determination that Sierra Club has standing. *See Disability Rights Wis. Inc. v. Walworth County Bd. of Supervisors*, 522 F.3d 796, 800 (7th Cir.2008).

1. Sierra Club member Barbara McKasson will suffer injury in fact.

Sierra Club relies on one of its members, Barbara McKasson, to establish standing. "[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons

for whom the aesthetic and recreational values of the area will be lessened by the challenged activity." *Laidlaw*, 528 U.S. at 183, 120 S.Ct. 693 (internal quotation marks omitted). McKasson states in an affidavit that she will experience diminished aesthetic and recreational value if the Company constructs and operates the power plant under the 2001 PSD permit. She explains that every other year since 1987, McKasson and her family have taken trips to fish, kayak, camp, and enjoy the natural beauty and clean environment of Rend Lake, located three miles from the proposed plant site. She claims if the Company builds the plant under the 2001 permit, she will cease her biennial recreational trips because the pollutants emitted based on the permit will harm her and diminish her aesthetic enjoyment of Rend Lake.

The defendants claim that McKasson's injury is insubstantial, but the "injury-in-fact necessary for standing 'need not be large, an identifiable trifle will suffice.'" *LaFleur v. Whitman*, 300 F.3d 256, 270 (2d Cir.2002) (quoting *Sierra Club v. Cedar Point Oil Co., Inc.*, 73 F.3d 546, 557 (5th Cir.1996)); *see also Doe v. County of Montgomery*, 41 F.3d 1156, 1159 (7th Cir.1994) ("[A]n identifiable trifle is enough for standing to fight out a question of principle . . . ." (quoting *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n. 14, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973))). If the proposed plant is built, McKasson will be exposed to emissions from the plant if she continues her longstanding tradition of visiting Rend Lake with her family. This "likely exposure" to pollutants is "certainly something more than an 'identifiable trifle,' even if the ambient level of air quality does not exceed [certain national limits]." *LaFleur*, 300 F.3d at 270-71; *see also Bensman v. United States Forest*

Serv., 408 F.3d 945, 962-63 (7th Cir.2005) (individual had standing to challenge a proposed project in a national forest when he had visited the project area six times over 20 years and planned to return soon). Moreover, if McKasson foregoes her regular visits to the lake because of these pollutants, that would also constitute an injury-in-fact. *See Laidlaw*, 528 U.S. at 183, 120 S.Ct. 693 (individual's affidavit stating that he foregoes using a river for recreational purposes because of pollution concerns was sufficient to show injury-in-fact); *see also Buono v. Norton*, 371 F.3d 543, 547 (9th Cir.2004) ("We have repeatedly held that inability to unreservedly use public land suffices as injury-in-fact."). McKasson's injuries are also ones that are "concrete and particularized" because they affect her in a "personal and individual way." *See Lujan*, 504 U.S. at 560 & n. 1, 112 S.Ct. 2130; *Coalition for the Env't v. Volpe*, 504 F.2d 156, 167 (8th Cir.1974) (holding that a proposed development that would increase pollution and traffic and limit plaintiffs' views was a cognizable injury that deprived plaintiffs of aesthetic and psychological benefit).

The defendants also argue that because the plant will take years to build, McKasson's injury is not "actual or imminent" and does not meet the second requirement for injury in fact. But the defendants forget that threatened injury can satisfy Article III standing requirements. *See Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979) ("[O]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough."); *see also Massachusetts v. EPA*, 549 U.S. 497, 127 S.Ct. 1438, 1455, 167 L.Ed.2d 248 (2007) (EPA's refusal to regulate greenhouse gas emissions presented an imminent risk of

harm); *MainStreet Org. of Realtors v. Calumet City*, 505 F.3d 742, 744 (7th Cir.2007) ("[S]tanding in the Article III sense does not require a certainty or even a very high probability that the plaintiff is complaining about a real injury, suffered or threatened."). The Company claims that the PSD permit that it received is still valid, and it (strenuously) argues that it has actually begun construction of the plant. As a practical matter, it makes sense for Sierra Club to challenge the validity of the Company's permit now, rather than waiting until the plant is operational. *See LaFleur*, 300 F.3d at 270 (likely exposure to emissions from a proposed but not yet built facility was "certainly an injury-in-fact"). Moreover, while this suit has been pending, the Company has again publicly announced its commitment to completing the plant. So "[t]his is not a case of some abstract psychic harm or a one-day-I'll-be-hurt allegation. . . ." *MainStreet*, 505 F.3d at 745. Injury to McKasson has been freshly threatened and is not merely hypothetical.

2. The injury is traceable to the proposed construction under the 2001 permit.

Sierra Club must also demonstrate that McKasson's injury is "fairly traceable" to the Company's construction of the plant under the 2001 PSD permit. *See Texas Indep. Producers & Royalty Owners Ass'n v. EPA*, 410 F.3d 964, 972 (7th Cir.2005). If the "independent action of some third party not before the court" causes McKasson's injury, then the complaint fails the traceability test. *Id.* (quoting *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130) (internal quotation marks omitted).

The defendants concede that under the 2001 PSD permit the proposed plant will emit airborne pollu-

tants, including mercury and particulate matter, three miles from Rend Lake. McKasson claims these pollutants and the resulting decrease in visibility will negatively impact her enjoyment of the lake. We agree that "[w]here a plaintiff has pointed to a polluting source as the seed of his injury, and the owner of the polluting source has supplied no alternative culprit, the 'fairly traceable' requirement can be said to be fairly met." *Friends of the Earth v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 162 (4th Cir.2000). Here, the defendants point to no other polluting source that could be the cause of McKasson's injury.

Nonetheless, the defendants claim Sierra Club still cannot show causation because the Company has designed its plant to produce emissions below permitted levels, so until the plant is built, there remains a factual question whether McKasson will actually be injured. This argument is in essence just a variation on the defendants' claim (rejected above) that McKasson has not yet suffered an "actual" or "imminent" injury. We agree that no one knows the ultimate magnitude of McKasson's injury—for example, we don't know if the particulate matter from the plant will blot out the sky or merely create a thin haze that's not visible to the naked eye, or if the airborne mercury will actually spread 45 miles to poison fish that McKasson currently consumes from a pond near her home (which is another harm she claims she will suffer). We do know, however, that the plant will release some pollutants and that McKasson believes these pollutants will ruin her ability to enjoy Rend Lake and taint the surrounding area. And her belief is not so irrational that it can simply be discredited. *See Laidlaw*, 528 U.S. at 182-83, 120 S.Ct. 693 (finding that a local citizens group

member suffered injury in fact because she believed that discharged pollutants had lowered her home's value). Because McKasson's injury stems from the emissions of the Company's proposed plant, we find that her threatened injury is fairly traceable to the plant.

3. Enjoining the Company from building based on its 2001 permit would likely redress McKasson's injury.

Finally, a plaintiff must show that a favorable decision will likely, not just speculatively, relieve her injury. *Id.* at 181, 120 S.Ct. 693. The defendants contend that the IEPA might not set lower emissions levels for a new PSD permit and that McKasson's concerns might remain even if the plant polluted at lower emission levels.

The defendants' argument, of course, presumes that the Company will actually seek out and receive a new permit. Despite publicly announcing that it would seek a new permit after it lost in the district court, the Company represented at oral argument that it had not yet begun this process. And even if the Company applied for and received a new permit, there would be some delay (the IEPA took almost a year before granting the 2001 permit) before the Company could begin construction. A decision in favor of Sierra Club, therefore, would at least redress McKasson's injury during that time.

Moreover, as Sierra Club notes, pollution control technology tends to improve over time, so it makes sense that a new permit would have more stringent emission standards than the 2001 permit. *See* 42 U.S.C. § 7475(a)(4) (major-emitting facilities must use the best available control technology to receive

PSD permits); *In re W. Suburban Recycling and Energy Ctr., L.P.*, 8 E.A.D. 192 (EPA App. Bd.1999). Indeed, the record indicates that the IEPA issued PSD permits in 2003 and 2005 for similar coal-fired power plants with emission standards that were significantly more stringent than those in the Company's 2001 permit. It is therefore reasonable to believe that any new permit the Company obtains will have tougher emission standards than the 2001 PSD permit. We need not determine exactly how much tougher those standards will be because McKasson need not show that a favorable decision will relieve her every injury. *Massachusetts*, 127 S.Ct. at 1458 (citing *Larson v. Valente*, 456 U.S. 228, 244 n. 15, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982)). It is enough that her concerns will be addressed if more stringent emission standards are imposed than those required under the 2001 permit, even though the plant will still emit some pollutants if the Company obtains a new PSD permit. *See id.* at 1458 n. 23 ("[E]ven a small probability of injury is sufficient to create a case or controversy . . . provided of course that the relief sought would, if granted, reduce the probability." (quoting *Vill. of Elk Grove Vill. v. Evans*, 997 F.2d 328, 329 (7th Cir.1993))). So it is likely that a favorable decision here will redress McKasson's, and hence Sierra Club's, injury.

Therefore, we conclude that Sierra Club has organizational standing to pursue this suit because it has shown that the Company's construction under the expired 2001 PSD permit would cause at least one of its members[2] to suffer injury in fact that is traceable

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[2] Sierra Club has another "standing plaintiff" but like the district court, we find it unnecessary to address her claims because McKasson has standing to sue.

to the Company and is redressable if Sierra Club prevails here.

B. Sierra Club's claim is ripe and permissible under 42 U.S.C. § 7604(a)(3).

The defendants rely on two district court decisions to argue that Sierra Club's claim is not ripe. *See United States v. Ill. Power Co.*, 245 F.Supp.2d 951, 956-57 (S.D.Ill.2003); *New York v. Niagara Mohawk Power Corp.*, 263 F.Supp.2d 650, 661 (W.D.N.Y.2003). The defendants contend that Sierra Club must wait until the Company actually begins constructing the plant before Sierra Club can allege that the Company has violated its preconstruction PSD permit.

The defendants misread these cases, which specify when the limitations period begins for claims that a company has violated a preconstruction permitting requirement. In that context, it makes sense to conclude that the *last* possible moment at which a preconstruction violation occurs is "when the actual construction is commenced, and not at some later point in time." *Ill. Power Co.*, 245 F.Supp.2d at 957; *see Niagara Mohawk Power Corp.*, 263 F.Supp.2d at 661-62. But it does not logically follow (nor do these cases suggest) that a preconstruction permit violation cannot occur *until* actual construction begins.

The defendants also argue that the citizen suit provision that Sierra Club relies upon, section 7604(a)(3), only allows suits against entities that are "without a permit," so Sierra Club cannot bring this suit because the Company received a permit (albeit one that may no longer be valid). The defendants cite no direct support for this position, instead claiming the matter is not ripe and cannot be adjudicated until

the IEPA issues a final decision whether the Company's 2001 permit has expired.

The defendants' argument ignores the explicit language of section 7604(a)(3). That provision states that "any person may commence a civil action on his own behalf . . . against any person . . . who is alleged . . . to be in violation of any condition of [a PSD] permit." The Company certainly is a person alleged to be in violation of a PSD permit—Sierra Club alleges that the Company violated the terms of its permit by not commencing construction of its facility in a timely fashion, which in turn caused the permit to expire. *See* 40 C.F.R. § 124.5(g)(2). And the IEPA made the same allegation when it preliminarily found that the Company's permit had expired. Moreover, even if having an expired permit were akin to having no permit at all, Sierra Club would still be able to sue under section 7604(a)(3), which enables citizens to sue entities like the Company that "*propose[ ] to construct* . . . new or modified major emitting facilit[ies] without a [PSD] permit." 42 U.S.C. § 7604(a)(3) (emphasis added).

It is irrelevant that the IEPA has yet to finish deciding whether the Company's permit is invalid because that's not what section 7604(a)(3) requires. In a circuit case referenced by both parties, *Grand Canyon Trust v. Tucson Elec. Power Co.*, 391 F.3d 979, 986 (9th Cir.2004), the Ninth Circuit held that a district court had jurisdiction over a citizen suit that challenged the validity of a permit even though the EPA had not yet acted to revoke the permit. The defendants claim *Grand Canyon* analyzed a different citizen suit provision than the one at issue here. That seems doubtful. *See id.* at 985 ("Unauthorized construction of a power plant violates the Clean Air Act

and provides grounds for a citizen suit under the Act's citizen suit provision. *See* 42 U.S.C. § 7604(a)(3) . . . "). Regardless, *Grand Canyon* does not suggest there is a categorical rule requiring a plaintiff to wait until the relevant agency finishes deciding whether a permit is valid (at least when, as here, a suit is not asking us to review an agency action). So in accordance with the plain language of section 7604(a)(3), we find that Sierra Club has properly brought this suit under that provision.

C. The Company did not "commence construction" of the plant.

As noted above, a PSD permit can expire and become invalid in one of three ways: (1) if construction is not "commenced" within 18 months after receipt of the permit, (2) if construction is discontinued for a period of 18 months or more after construction has begun, or (3) if construction is not completed within a reasonable time. *See* 40 C.F.R. § 52.21(r)(2). Similarly, the Company's PSD permit stated it would become invalid if:

> construction of CFB [circulating fluidized bed] boilers is not commenced within 18 months after this permit becomes effective, if construction of these boilers is discontinued for a period of 18 months or more, or if construction of these boilers is not completed within a reasonable period of time.

The permit issued on July 3, 2001, so its drop-dead date was January 3, 2003.[3] The question is whether

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[3] The defendants argued before the district court that the Company was entitled to various extensions and grace periods, thereby delaying the deadline to February 10, 2003. While the district court did not decide whether this was correct, it noted

the Company "commenced" construction of its plant by that deadline.

42 U.S.C. § 7479(2)(A) states there are two ways in which construction can "commence":

> (i) [the owner or operator has] begun, or caused to begin, a continuous program of physical on-site construction of the facility or
>
> (ii) [the owner or operator has] entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of construction of the facility to be completed within a reasonable time.

See also 40 C.F.R. § 52.21(b)(9) (defining "[c]ommence as applied to construction" similarly). The district court concluded the Company had neither commenced a program of actual construction nor entered into a binding agreement to undertake such a program. The district court also found that even if the Company had begun constructing the plant, it had lapsed in its construction activity for more than 18 months, thereby invalidating the PSD permit.

On appeal, the defendants assert there are genuine factual disputes that should have prevented the district court from granting summary judgment to Sierra Club. We review the district court's grant of summary judgment de novo and construe all facts in the light most favorable to the defendants. *See Rawoof v. Texor Petroleum Co.*, 521 F.3d 750, 755 (7th Cir. 2008).

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that the defendants lost even under the February 10 date. The defendants do not re-argue these extensions on appeal, so the January 3, 2003, deadline is the operative one.

1. No reasonable factfinder could find that the Company had started a timely program of actual construction or engaged in construction activities without an impermissible lapse.

The defendants claim that the Company prevented its 2001 PSD permit from expiring by beginning "a continuous program of actual construction" that included "conducting engineering studies [and] excavation work." We disagree.

The EPA defines "begin actual construction" as:

> [I]n general, *initiation of physical on-site construction activities on an emissions unit which are of a permanent nature.* Such activities include, but are not limited to, installation of building supports and foundations, laying underground pipework and construction of permanent storage structures. With respect to a change in method of operations, this term refers to those *on-site activities other than preparatory activities* which mark the initiation of the change.

40 C.F.R. § 52.21(b)(11) (emphases added); *see also* 40 C.F.R. § 52.21(b)(8) (defining "construction" as "any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) that would result in a change in emissions"). We acknowledge (as the defendants strenuously argue) that beginning actual construction might be something slightly different than beginning a continuous program of physical on-site construction, as required under 42 U.S.C. § 7479(2)(A)(i). But the Company did not engage in any kind of permanent construction activity at all. As of the PSD permit's expiration date of January 3, 2003, the Company had laid no founda-

tion and constructed no building supports, underground pipework, or permanent storage structures. Importantly, the Company had not begun constructing the CFB boilers, which was something that the PSD permit had explicitly required that the Company do before January 3. Indeed, the only construction activity performed by the Company was that it had directed Alberici Constructors to dig a hole, which Alberici began to do on January 8. Alberici's minimal work hardly heralded the start of a "continuous program" of actual construction, as Alberici stopped digging the hole on February 14, 2003, after a payment dispute. And digging the hole was not construction activity "of a permanent nature," as the Company's landlord later had the hole refilled.

Our conclusion here is further buttressed by a July 1, 1978, memorandum sent by Edward E. Reich, Director of Stationary Source Enforcement at the EPA, and entitled "'Commence Construction' Under PSD" (the "Reich Memorandum").[4] In addressing what constitutes physical on-site construction, the

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[4] While the EPA did not promulgate the Reich Memorandum as part of its rulemaking authority, an "agency's interpretation [of its own regulations] must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512, 114 S.Ct. 2381, 129 L.Ed.2d 405 (1994) (internal quotation marks omitted). Indeed, "it can still be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which 'Congress did not actually have an intent' as to a particular result." *United States v. Mead Corp.*, 533 U.S. 218, 229, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001) (quoting *Chevron, USA, Inc. v. NRDC, Inc.*, 467 U.S. 837, 845, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)).

Reich Memorandum specifically notes that "[a]ctivities such as site clearing and excavation work will generally not satisfy the commence construction requirements." Reich Memorandum ("As stated in the preamble to the draft regulations, 'it will not suffice merely to have begun erection of auxiliary buildings or construction sheds unless there is clear evidence (through contracts or otherwise) that construction of the entire facility will definitely go forward in a continuous manner'."). The defendants have provided no reason why we should ignore the EPA's guidance on this issue or why this case is a special one that merits ignoring this general rule.

Finally, we note that even if the Company had "commenced construction" of the plant, it lapsed in construction for over 18 months, thereby invalidating its PSD permit. After Alberici stopped digging on February 14, 2003, it performed no more excavation work at the site. Indeed, the site appears to have lain dormant for over 19 months until September 29, 2004, when another company began digging a second hole for the Company. This 19-month lapse in construction activity killed the Company's PSD permit. *See* 40 C.F.R. §§ 52.21(r)(2), 124.5(g)(2).

2. No reasonable factfinder could find that the Company had timely entered a binding contract to undertake a program of actual construction.

The defendants alternatively claim that the Company had "commenced construction" within 18 months of the permit's issuance by signing a "construction memorandum" with B & V in late 2002, thereby requiring those parties to "work together on an exclusive basis ... in order to draft and negotiate the EPC [Engineering, Procurement and Construction] Contract." To count as a contract that commenced

construction, the construction memorandum would have to be one "which [could not] be canceled or modified without substantial loss to the owner or operator, to undertake a program of construction of the facility to be completed within a reasonable time." 42 U.S.C. § 7479(2)(A)(ii).

Even if entering the construction memorandum counted as "commencing construction" of the power plant, the Company's permit expired because of the 19-month lapse between February 2003 and September 2004 in which the Company did no construction work on the facility. *See supra* II(C)(1). The Company would have to argue (which it doesn't) that the construction memorandum somehow prevented this 19-month lapse from killing the permit. But such an interpretation would in effect allow a PSD permittee to trump the 18-month lapse provision and indefinitely delay the construction of a facility so long as the permittee has entered a contract that "commences construction." We see no basis for reading the EPA regulations in this manner. *See* 40 C.F.R. § 52.21(r)(2) (noting that a PSD permit expires "if construction is discontinued for a period of 18 months or more" or "if construction is not completed within a reasonable time"); *see also* 40 C.F.R. § 52.21(b)(8); Reich Memorandum ("In order to assure that construction proceeds in a continuous manner and is completed within a reasonable time, the regulations require that a break in construction of greater than 18 months or failure to commence construction within 18 months of PSD permit issuance will generally invalidate a source's PSD permit.").

At any rate (as we discuss below), the Company's signing of the construction memorandum did not "commence construction" of the power plant. Before

we interpret the memorandum, however, we note that the parties disagree on which jurisdiction's law we should apply. Sierra Club claims we should follow a choice of law provision in the construction memorandum, which specifies that the agreement is to be interpreted "in accordance with the substantive law of the State of New York, except for its choice of laws provisions." *See Am. Fuel Corp. v. Utah Energy Dev. Co., Inc.*, 122 F.3d 130, 134 (2d Cir.1997) ("[W]here the parties have agreed to the application of the forum law, their consent concludes the choice of law inquiry."). The defendants counter that an Illinois statute renders the memorandum's choice of law provision void and points us to Illinois law: *See* 815 Ill. Comp. Stat. Ann. 665/10 (2008) ("A provision contained in or executed in connection with a building and construction contract to be performed in Illinois that makes the contract subject to the laws of another state . . . is against public policy. Such a provision is void and unenforceable.").

We need not decide who is right because both New York and Illinois law[5] would characterize the

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[5] The defendants suggest that a "third alternative" would be to apply federal common law in interpreting the contract, but they don't explain why that alternative should apply here. The two primary cases they cite involved contracts in which the federal government was a party. *See United States v. Seckinger*, 397 U.S. 203, 209-10, 90 S.Ct. 880, 25 L.Ed.2d 224 (1970) ("[F]ederal law controls the interpretation of [a] contract . . . entered into pursuant to authority conferred by federal statute and, ultimately, by the Constitution."); *Funeral Fin. Sys. v. United States*, 234 F.3d 1015, 1018 (7th Cir.2000) ("Interpreting the meaning of a provision in a federal government contract is a matter of federal common law. . . ."). That's a materially different situation from what we have here. The defendants also note that federal common law can be applied when "necessary to protect uniquely federal interests," but they don't explain why

construction memorandum as a preliminary agreement that required the parties to conduct further negotiations, not a construction contract to build a power plant. New York law recognizes that parties can enter into precisely this kind of preliminary agreement:

> The parties agree on certain major terms, but leave other terms open for further negotiation. . . . [This type of agreement] 'does not commit the parties to their ultimate contractual objective but rather to the obligation to negotiate the open issues in good faith in an attempt to reach the . . . objective within the agreed framework.' A party to such a binding preliminary commitment has no right to demand performance of the transaction.

Adjustrite Sys. v. GAB Bus. Servs., 145 F.3d 543, 548 (2d Cir.1998) (quoting *Teachers Ins. & Annuity Assoc. of Am. v. Tribune Co.*, 670 F.Supp. 491, 498 (S.D.N.Y.1987)). Similarly, "Illinois law recognizes the prerogative to agree to further negotiations, even after most essential contract terms have been settled, while remaining free to back out of a pending deal until the occurrence of some later event." *Venture Assoc. Corp. v. Zenith Data Systems Corp.*, 987 F.2d 429, 432 (7th Cir.1993).

Here, the construction memorandum was merely a preliminary step toward the parties' ultimate goal-agreeing on an EPC contract for building the power plant. Contrary to the defendants' claim that the

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such federal interests are present here, or why we should disregard both the contracting parties' choice of law (New York law) and the preference indicated by the Illinois statute (Illinois law), particularly when both point to the same outcome.

memorandum required the parties to "undertake a program of construction of the facility," the memorandum only required the parties to work together toward reaching an actual construction agreement. The memorandum specified that the parties would "agree to work with each other in good faith . . . to complete the drafting and negotiation of the EPC CONTRACT, with the goal of agreeing and signing such EPC CONTRACT by September 1, 2005." The memorandum was clear that it did not enable the Company to demand that B & V perform construction work: "The PARTIES agree that upon Termination of the CONSTRUCTION MEMORANDUM, CONTRACTOR shall have no liability to perform the EPC Work Scope for the FCP [Franklin County Power] PROJECT for the OWNER." Moreover, the memorandum was hardly a final agreement for building the plant as it noted that B & V was "continuing to develop a firm price and Draft EPC Contract" for the project.

The construction memorandum also listed various events that could terminate the agreement, but none of these events was anything like "completing construction of the plant" or "finishing the construction project," which would have suggested that the construction memorandum was *the* contract for building the plant. Rather, the terminating events included "[t]he date of signature of the EPC CONTRACT for the FCP PROJECT" and the "[f]ailure of the PARTIES to reach agreement on an EPC Contract by September 1, 2005 or such later date as may be agreed in writing by the PARTIES," which again indicate that the construction memorandum was just a preliminary agreement en route to an EPC contract.

Even if the language of the construction memorandum was unclear, extrinsic evidence (which the defendants encourage us to utilize) would support the same conclusion. As of January 2006, after the construction memorandum had expired, the parties still had not agreed on a price term—while the term sheet contemplates a price of $615 million for the EPC contract, B & V advised the Company on January 10, 2006, that the project would be in the "$710m plus range." B & V also told the Company that the project would require 45 months or more to completion, not the Company's target of 32 months, and advised the latter, "If you can find someone competent who will do the project for $615m and 32 months you must go ahead and work with them." These facts indicate that the construction memorandum was not a contract to build the actual plant.

The defendants also claim that the construction memorandum's $72 million termination fee (which they represented at oral argument that they would have to pay if they lost this suit) indicates that this was a contract to construct the power plant. This fee appears to be less than 10% of the total project cost, which was estimated by the defendants at oral argument to be between $750 million and $1 billion. *See* Reich Memorandum ("A Contractual obligation for purposes of commencing construction must also be one which cannot be cancelled or modified without substantial loss. . . . Whether a loss of less than or equal to 10% of the total project cost will be considered substantial will be determined on a case by case basis.").

At any rate, the existence of this fee doesn't affect our conclusion that the memorandum is just a preliminary agreement requiring the parties to conduct

further negotiations. *Cf. id.* ("[C]ontracts for non site specific equipment, such as boilers, will typically not suffice, regardless of any penalty clauses contained in the contracts."). Indeed, we have previously noted that parties often include these kinds of termination fees in preliminary agreements:

> The process of negotiating multimillion dollar transactions . . . often is costly and time-consuming. The parties may want assurance that their investments in time and money and effort will not be wiped out by the other party's footdragging or change of heart or taking advantage of a vulnerable position created by the negotiation. . . . [T]hey might prefer to create [a contractual remedy] in the form of a deposit or drop fee (what in publishing is called a "kill fee"), rather than rely on a vague duty to bargain in good faith. . . .

Venture Assocs. Corp. v. Zenith Data Systems Corp., 96 F.3d 275, 278 (7th Cir.1996) (internal citations omitted). So the presence of this fee does not imply that the construction memorandum was a contract to build the power plant.

> Damages for breach of an agreement to negotiate may be, although they are unlikely to be, the same as the damages for breach of the final contract that the parties would have signed. . . .

Finally, the defendants contend that the use of the word "program" in "program of construction" suggests that we should interpret more broadly which construction contracts count as "commencing construction" and not limit ourselves to contracts for actual construction of a facility. We are not so sure. *Cf. Sierra Pac. Power Co. v. EPA*, 647 F.2d 60, 67 (9th Cir.1981) (citing *United States v. City of Painesville*,

431 F.Supp. 496, 500 n. 5 (N.D.Ohio 1977), *aff'd*, 644 F.2d 1186 (6th Cir.1981)) (approving the EPA's decision not to read the word "program" broadly to include planning and design of a unit). But at any rate, the construction memorandum was not a contract for a "program" of construction activity. As the Reich Memorandum notes, "In order to satisfy the commence construction requirements, a contractual obligation must be for a site specific commitment. The types of activities which will be considered site specific for purposes of a contract are identified in question # 1 ['placement, assembly, or installation of materials, equipment, or facilities which will make up part of the ultimate structure of the source']." Here, the construction memorandum did not require B & V to do any site-specific construction (or even any nonsite-specific construction). It was, to reiterate, just a contract that required the parties to work toward an EPC agreement. And the Reich Memorandum indicates that entering this kind of contract is simply not enough to "commence construction."

This conclusion makes sense. Time limits prevent companies from sitting on PSD permits for an unreasonably long period of time. Presumably these requirements help ensure that major emitting facilities comply with up-to-date emissions regulations and do not construct today's facilities with yesterday's technology. Reading the phrase "program of construction" so broadly as to encompass the construction memorandum would greatly extend the time that companies could delay the actual construction process. We decline to adopt that interpretation here.

D. The district court did not err in granting injunctive relief in favor of Sierra Club.

The defendants also challenge on two grounds the district court's decision to grant injunctive relief in favor of Sierra Club. First, the defendants claim the district court lacked jurisdiction to grant an injunction because, according to them, a civil penalty is the sole remedy for the citizen suit here. The defendants rely on language at the end of 42 U.S.C. § 7604(a) (emphases added):

> The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to *enforce such an emission standard or limitation, or such an order,* or *to order the Administrator to perform such act or duty,* as the case may be, and *to apply any appropriate civil penalties* (except for actions under paragraph (2)).

The defendants claim the first two remedies emphasized above correlate with sections 42 U.S.C. §§ 7604(a)(1) and (a)(2), respectively, and the third remedy (*i.e.*, "civil penalties") applies to 42 U.S.C. § 7604(a)(3), the provision at issue in this citizen suit. Specifically, the defendants contend that the district court could only award civil penalties and not an injunction as a remedy for Sierra Club's section 7604(a)(3) suit here.

The defendants' argument lacks merit. The statute does not state that the three remedies listed above are exclusively available for suits that are brought under their "corresponding" statutory subsections. In fact, the statute suggests just the opposite when it states that the third remedy ("any appropriate civil penalties") is not available for "actions under para-

graph (2) [section 7604(a)(2)]," which implies that this remedy *is* available for actions under sections 7604(a)(1) and 7604(a)(3).

Moreover, the defendants have not cited (and we have not found) any case law that has interpreted the provision in the manner that they propose. Sierra Club, on the other hand, can point to at least one case that directly contradicts the defendants' position. *See United States v. Am. Elec. Power Serv. Corp.*, 137 F.Supp.2d 1060, 1067 (S.D.Ohio 2001). Although this district court case is not binding on us, we agree that "a plain reading of the statute" implies "that the [injunctive remedies provision] applies to actions under [section 7604](a)(3)." *Id.*

The defendants also claim the district court erred by not performing the standard four-part analysis that precedes an award of injunctive relief. That analysis generally requires a court to consider (1) whether the plaintiff has suffered or will suffer irreparable injury, (2) whether there are inadequate remedies available at law to compensate for the injury, (3) the balance of hardships, and (4) the public interest. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 126 S.Ct. 1837, 1839, 164 L.Ed.2d 641 (2006); *e360 Insight v. The Spamhaus Project*, 500 F.3d 594, 604 (7th Cir.2007). We review the district court's entry of such an injunction for an abuse of discretion. *e360*, 500 F.3d at 603.

Circuit courts have upheld orders granting injunctive relief where a district court did not perform a complete four-part analysis when a plaintiff prevailed on the merits of his claim, *see Fogie v. THORN Americas, Inc.*, 95 F.3d 645, 654 (8th Cir.1996), or when, in an action for a statutory injunction, a violation was demonstrated and there was a reasonable

likelihood of future violations, *see United States v. Kaun*, 827 F.2d 1144, 1148 (7th Cir.1987). Moreover, "[i]t is an accepted equitable principle that a court does not have to balance the equities in a case where the defendant's conduct has been willful." *EPA v. Envtl. Waste Control*, 917 F.2d 327, 332 (7th Cir.1990).

Sierra Club latches on to this last exception, claiming that the Company has engaged in willful misconduct by persisting in its "proposal to construct this Project without a valid permit." But Sierra Club cites no authority to explain how the Company's persistence constitutes willful misconduct. The Company need not roll over and concede that its permit is invalid—indeed, that's what this litigation is all about. Unlike cases in which defendants flaunted environmental laws by, for example, not implementing control systems for hazardous wastes, *see United States v. Bethlehem Steel Corp.*, 38 F.3d 862, 865, 867-68 (7th Cir.1994), the Company here is simply defending the validity of its permit in court. And the Company's arguments are not so frivolous as to make us believe that its defense is akin to some kind of malicious intransigence.

Still, we need not remand this case for the district court to explicitly analyze the injunctive relief factors. The court found that the Company did not have a valid PSD permit when it granted Sierra Club's motion for summary judgment. Because EPA regulations require the Company to obtain such a permit before it can build the facility, 42 U.S.C. § 7475(a)(1), the court's decision leaves the Company no option but to obtain this permit before it can commence construction. So the court's injunction, which prohibits the Company from "actual construction of the Plant

until [it has] obtained a valid PSD permit," is essentially the same as the court's finding on the merits. *See Fogie*, 95 F.3d at 654 (holding that by prevailing on the merits of its claim, "the plaintiff class has demonstrated that the four factors of this test overwhelmingly militate in favor of an injunction").

Moreover, this is not a case where a plaintiff sued an already-operational facility and claimed it was polluting in excess of permissible limits. In such a situation, a district court would likely need to balance equities before it granted injunctive relief and shut down the facility. *See Harrison v. Indiana Auto Shredders Co.*, 528 F.2d 1107, 1123 (7th Cir.1975). Here, the only cost to the Company of the injunction is that it must now obtain a new permit before it can build, which was already implicit in the court's decision granting summary judgment.

Additionally, the record here demonstrates that the four injunctive relief factors favor Sierra Club. First, Sierra Club will likely suffer irreparable injury if the Company builds under its expired PSD permit rather than a new permit because the former likely includes more relaxed emission standards. *See supra* section II(A)(3); *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987) (environmental injuries are "often permanent or at least of long duration, *i.e.*, irreparable"). Second, legal remedies will not adequately address Sierra Club's injury. The record shows that at least one Sierra Club member will likely suffer a decrease in recreational and aesthetic enjoyment of Rend Lake if the plant is built according to the 2001 permit. An economic award would not sufficiently compensate for this injury. *See Amoco*, 480 U.S. at 545, 107 S.Ct. 1396 ("Environmental injury, by its nature, can

seldom be adequately remedied by money damages. . . ."); *Envtl. Waste Control*, 917 F.2d at 332.

Third, the balance of harms favors issuing an injunction. An injunction protects Sierra Club from irreparable injury while simply requiring the Company to defer construction until it obtains a permit that complies with the Clean Air Act. Finally, the record contains no evidence that the injunction harms the public interest. In fact, based on the record before us, we agree with Sierra Club that requiring the Company to obtain a valid PSD permit would likely result in decreased emissions and improved public health, which would further a stated goal of the Clean Air Act. *See* 42 U.S.C. § 7401(b)(1) ("to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population").

Although in most instances we would remand a case when a district court did not clearly explain why it granted injunctive relief, *see e360*, 500 F.3d at 604, we need not remand here because the court's decision on the merits essentially embraced the remedy and the injunctive relief factors favor Sierra Club. A remand on this issue would merely prolong the case, result in additional costs, and not change the outcome. *Cf. Books v. Chater*, 91 F.3d 972, 978 (7th Cir.1996); *DiLeo v. Ernst & Young*, 901 F.2d 624, 626 (7th Cir.1990).

III. CONCLUSION

The judgment of the district court is AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

Case No. 05-cv-4095-JPG

SIERRA CLUB,

Plaintiff,

vs.

FRANKLIN COUNTY POWER OF ILLINOIS, LLC f/k/a ENVIROPOWER OF ILLINOIS, LLC; ENVIROPOWER, LLC; and KHANJEE HOLDING (US) INC.,

Defendants.

MEMORANDUM AND ORDER

This matter comes before the Court on the cross motions for summary judgment filed by plaintiff the Sierra Club (Doc. 51) and defendants Franklin County Power of Illinois, LLC ("FCP"), EnviroPower, LLC ("EnviroPower") and Khanjee Holding (US) Inc. ("Khanjee") (Doc. 63). The parties have responded to the respective motions (Docs. 90 & 93), and replied to the respective responses (Docs. 96 & 97). In conjunction with the parties' summary judgment motions, the Court considers the Sierra Club's motion to strike (Doc. 72) and the defendants' response (Doc. 74), the defendants' motion to exclude testimony (Doc. 77) and the plaintiff's response (Doc. 82), and the defendants' motion to strike (Doc. 78), the plaintiff's response (Doc. 83) and the defendants' reply (Doc. 88). The Court also considers the defendants' motion to dismiss (Doc. 65), to which the Sierra Club has re-

sponded (Doc. 92), and to which the defendants have replied (Doc. 98).

The Sierra Club believes that the defendants are proposing to construct a power plant in Benton, Illinois, ("Plant") without a required permit. They bring this suit under the citizen suit provision of the Clean Air Act ("CAA"), 42 U.S.C. § 7604(a), seeking an injunction stopping that construction until the defendants obtain a valid permit as well as fines, costs and attorney's fees. The defendants contend that the Court does not have jurisdiction to hear this suit and, alternatively, that the Sierra Club is barred by the Constitution and by statute from bringing this suit and that the defendants possess the required permit. The Court will briefly review the relevant statutory and regulatory provisions before addressing the defendants' jurisdictional argument. If necessary, it will then proceed to analyze the substantive issues raised in the pending motions.

I. Statutory and Regulatory Framework

Congress enacted the CAA, 42 U.S.C. § 7401 *et seq.*, in part to protect the public from the harmful effects of air pollution. To this end, the act includes provisions aimed specifically at preventing significant deterioration of air quality. 42 U.S.C. §§ 7470-7492. Among those provisions is one that states:

> No major emitting facility on which construction is commenced after August 7, 1977, may be constructed in any area to which this part applies unless — (1) a permit has been issued for such proposed facility in accordance with this part setting forth emission limitations for such facility which conform to the requirements of this part. . . .

42 U.S.C. § 7475(a). The permit referred to in this provision is commonly called a "PSD permit." A PSD permit contains an emission limitation which the permit issuer, the Illinois Environmental Protection Agency ("IEPA") in Illinois, has determined reflects the best available pollution control technology (the "best available control technology" or "BACT"). *See* 42 U.S.C. §§ 7475(a)(4) & 7479(3).

The United States Environmental Protection Agency ("EPA"), which Congress has charged with promulgating regulations to implement the CAA, has promulgated a regulation stating that a PSD permit becomes invalid:

> if construction is not commenced within 18 months after receipt of such approval, if construction is discontinued for a period of 18 months or more, or if construction is not completed within a reasonable time. The Administrator may extend the 18-month period upon a satisfactory showing that an extension is justified.

40 C.F.R. § 52.21(r)(2). The expiration is automatic and does not rely on any action by any agency to take effect. *See* 40 C.F.R. § 124.5(g)(2) ("PSD permits may be terminated only by rescission under § 52.21(w) or by automatic expiration under § 52.21(r)."); *Grand Canyon Trust v. Tucson Elec. Power Co.*, 391 F.3d 979, 983-84 (9th Cir. 2004) (interpreting a nearly identical prior version of the regulation). Owners or operators seeking to construct major emitting facilities run the risk that if a PSD permit expires, they will then be subject to stricter BACT standards when applying for a new permit because of pollution control developments since their original permits were issued.

Congress defines commencement of construction of a major stationary source of air pollution (like the Plant) to mean:

> that the owner or operator has obtained all necessary preconstruction approvals or permits required by Federal, State, or local air pollution emissions and air quality laws or regulations and either has (i) begun, or caused to begin, a continuous program of physical on-site construction of the facility or (ii) entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of construction of the facility to be completed within a reasonable time.

42 U.S.C. § 7479(2)(A). The EPA similarly defines commencement of construction to mean:

> that the owner or operator has all necessary preconstruction approvals or permits and either has:
>
> > (i) Begun, or caused to begin, a continuous program of actual on-site construction of the source, to be completed within a reasonable time; or
> >
> > (ii) Entered into binding agreements or contractual obligations, which cannot be cancelled or modified without substantial loss to the owner or operator, to undertake a program of actual construction of the source to be completed within a reasonable time.

40 C.F.R. § 52.21(b)(9).

The EPA further defines "beginning actual construction" to mean:

> in general, initiation of physical on-site construction activities on an emissions unit which are of

> a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying underground pipework and construction of permanent storage structures. With respect to a change in method of operations, this term refers to those on-site activities other than preparatory activities which mark the initiation of the change.

40 C.F.R. § 52.21(b)(11).

II. Facts

There is no dispute over many of the relevant facts in this case. The Court sets forth the undisputed facts in this section and will discuss the disputed facts as they become relevant to the resolution of the pending motions.

All parties agree that in December 1999, EnviroPower entered into a 99-year lease with Old Ben Coal Company (a subsidiary of Horizon Natural Resources) for the land on which it intends to build the Plant and that in December 2000, EnviroPower assigned the lease to FCP.

They also agree that in August 2000, FCP requested that the IEPA issue a PSD permit, that the Sierra Club did not participate in the review process for issuing the PSD permit, and that on July 3, 2001, the IEPA issued FCP a PSD permit. On July 9, 2003, FCP actually received the PSD permit, which contained the following provisions:

> 19a. This permit shall become invalid as follows, pursuant to 40 CFR 52.21(r)(2). This condition supersedes standard Condition 1. The Illinois EPA is administering these standards in Illinois on behalf of the United States EPA under a delegation agreement.

> This Permit shall become invalid if construction of CFB [circulating fluidized bed] boilers is not commenced within 18 months after this permit becomes effective, if construction of these boilers is discontinued for a period of 18 months or more, or if construction of these boilers is not completed within a reasonable period of time.
>
> b. For purposes of the above provisions, the definitions of "construction" and "commence" at 40 CFR 52.21(b)(8) and (9) shall apply, which require that a source must enter into a binding agreement for on-site construction or begin actual on-site construction. (Also see the definition of "begin actual construction," 40 CFR 52.21(b)(11)).

PSD Permit at 16-17.

Before and after receiving the permit, the defendants worked toward completion of the Plant. They obtained an engineering report and a scoping study, began working on a boiler design and procurement of necessary resources and achieved other tasks essential to construction of the Plant. In mid-2002, Khanjee began to serve as the lead developer of the Plant project and shortly thereafter hired Acres International, Inc. as a consulting engineer and began to evaluate engineering companies to serve as the contractor for the Plant project.

All parties agree that sometime between November 21 and December 2, 2002, EnviroPower and Black & Veatch entered into an agreement entitled "Construction Memorandum" which had as its subject "Construction Agreement for 534 MW Franklin County Power of Illinois (FPC) - EPC Contract" and had an

effective date of December 1, 2002. The Construction Memorandum begins:

> The following documents the agreements reached at meetings held in Cincinnati, Ohio on November 21, 2002 and subsequent discussions concerning the EPC [engineering, procurement and construction] contract for a 534 MW CFB project to be executed on behalf of EnviroPower, L.L.C. under the conditions stipulated in the following.

It also contains the following provisions, among many others:

> Black & Veatch has exclusively been designated as ("CONTRACTOR"), and been assigned to develop, in conjunction with EnviroPower, LLC as ("OWNER"), an EPC Consortium for the Project, along with the EPC Contract.
>
> The Parties agree that this CONSTRUCTION MEMORANDUM and the accompanying TERM SHEET form the agreement between the Parties.
>
> The Parties agree to be forthwith legally bound by the TERMINATION OF CONSTRUCTION MEMORANDUM, TERM SHEET AND/OR EPC CONTRACT WITHOUT DEFAULT section of the accompanying Term Sheet. The remaining sections of the Term Sheet are agreed by the Parties and intended to be incorporated into the EPC Contract.
>
> Contractor may . . . enter into a contractual agreement with one or more parties . . . to design and furnish the circulating fluidized bed (CFB) boilers and the steam turbine generator or to perform portions of the construction work. . . . .

CONTRACTOR is continuing to develop a firm price and Draft EPC Contract for the FPC project, based on the provisions of Article 7 hereof.

* * *

AGREEMENT TO WORK TOGETHER

The OWNER wishes to award a contract for the EPC of the FCP PROJECT (hereinafter referred to as "EPC CONTRACT") to CONTRACTOR and to work exclusively with them as set forth herein with the good faith intent to complete the drafting and negotiation of said EPC Contract on the basis of the attached Term Sheet.

The PARTIES agree to work with each other in good faith in accordance with the terms of this CONSTRUCTION MEMORANDUM to complete the drafting and negotiation of the EPC CONTRACT, with the goal of agreeing and signing such EPC CONTRACT by September 1, 2005.

EXCLUSIVITY

The PARTIES agree to work together on an exclusive basis for the term of this CONSTRUCTION MEMORANDUM which commences on December 1, 2002 and ends upon the earlier of the execution of the EPC Contract or November 30, 2005, or for such longer period as the PARTIES may jointly agree in writing in order to draft and negotiate the EPC CONTRACT for the FCP PROJECT. Therefore, the OWNER agrees that it will not directly or indirectly, alone or collectively, participate in discussions or negotiations with any other person(s) or entity(ies) other than CONTRACTOR concerning the EPC CON-

TRACT during the term of the CONSTRUCTION MEMORANDUM.

* * *

In accordance with this CONSTRUCTION MEMORANDUM, PARTIES shall further investigate various aspects of the FCP PROJECT in order to finalize the Contract Price and Project Schedule. . . .

* * *

This CONSTRUCTION MEMORANDUM shall expire upon the occurrence of any one of the following events:

* * *

(v) The date of signature of the EPC CONTRACT for the FCP PROJECT.

The Term Sheet accompanying the Construction Memorandum included the following provisions:

PURPOSE The proposed business terms and conditions contained herein, together with the documents listed in Attachment 1 to the CONSTRUCTION MEMORANDUM, form the basis of Owner and Contractor's agreement for engineering, procurement and construction ("EPC") of the Project.

The Parties agree to use reasonable diligence to complete a mutually acceptable final written contract with respect to the scope of work and terms and conditions described in the following Term Sheet.

The Term Sheet then listed numerous obligations and other terms to be included in the EPC Contract, including a ceiling for the price to be paid to Black & Veatch, a time period after construction begins (39 months) in which construction must be substantially completed and a maximum termination penalty payable if the parties fail to agree on an EPC Contract ($72 million).

The parties agree that on or around December 18, 2002, EnviroPower contracted with Alberici Constructors, Inc. for on-site, boiler-house sub-foundation work. The contract did not specifically call for pouring concrete, but Alberici's response to the "request for proposal" that preceded the contract included the tasks of excavating to competent rock, that is, a rock surface suitable to support the foundation, and pouring some concrete that would serve as part of the foundation. On January 3, 2003, four Alberici employees began delivering equipment to the proposed Plant site. On January 8, 2003, Alberici employees began excavation.

In late January or early February, Alberici unexpectedly encountered obstructions in the form of underground reinforced concrete structures. Because some of these structures would interfere with pouring concrete for EnviroPower, Alberici began removing them from the site. At some point after Alberici submitted its first invoice to EnviroPower on February 5, 2003, a dispute over payment arose. On February 14, 2003, Alberici stopped excavating and stopped removing the underground concrete structures. The Alberici employees never completely removed the concrete obstacles, dug deep enough to find competent rock, or poured any concrete. From February 2003 to June 2003, Alberici billed EnviroPower for work at

the site, although after February 14, no worker billed time for actual excavation work. The bills after February 14 included one day where workers showed up but performed no work; all other days included only the supervisor's hours spent maintaining a protective barricade of the site. The vast majority of the amounts claimed after February 14 were for equipment rental.

On March 31, 2003, Khanjee and EnviroPower entered into a Development Agreement and Purchase Agreement, and in August 2003, Khanjee issued an Offering Memorandum seeking financial support for the Plant construction. In 2004, the required financing became available.

In the meantime, FPC failed to make a payment of approximately $870,000 to Horizon for the lease of the site, which was due January 1, 2003. After efforts to negotiate new lease arrangements or FPC's purchase of the land from Horizon failed, on January 27, 2004, Horizon sent the defendants a termination and eviction notice for non-payment of rent, effective February 7, 2004. That summer, the site and any rights under the lease were transferred to Lexington Coal Company ("Lexington") through Horizon's bankruptcy proceedings, and in July 2004 Lexington filled the hole dug by Alberici.

In September 2004, FPC contracted with J.M. Jones, Inc. for more excavation and for pouring concrete, and on September 29, 2004, Jones began digging. The following day, an inspector from the IEPA visited the proposed Plant site and found that construction had commenced. Jones later poured some concrete and moved an empty trailer to the site.

In the meantime, the IEPA reconsidered its finding that construction had commenced and instead made a preliminary finding that EnviroPower's PSD permit had expired and asked it for more information to review the permit status. The EPA also requested more information from the defendants.

On January 1, 2005, the Sierra Club issued the defendants a Notice of Intent to Sue. Shortly thereafter, the IEPA and the EPA again requested more information from the defendants, and EnviroPower responded to those requests. Neither agency, however, made a final determination as to the validity of EnviroPower's PSD permit.

On May 20, 2005, the Sierra Club filed this lawsuit under the citizen suit provision of the CAA alleging that the defendants propose to construct the Plant without a valid PSD permit. As of the date the lawsuit was filed, EnviroPower and Black & Veatch had not finalized the contract contemplated by the Construction Memorandum.

III. Jurisdiction

The defendants argue that the Court does not have jurisdiction to hear this suit because the Sierra Club has not alleged a cause of action under the CAA, because it is protected by a "permit shield" statute, and because it lacks standing to sue. They seek dismissal of this case under Federal Rule of Civil Procedure 12(b)(1) and summary judgment under Federal Rule of Civil Procedure 56.

A. Failure to State a Claim

The defendants argue that the Court has no jurisdiction to hear this case because the Sierra Club has failed to allege a CAA violation, which is a prerequi-

site to the Court's exercising jurisdiction under the citizen suit provisions of the act, 42 U.S.C. § 7604(a). They bring this challenge under Rule 12(b)(1).

A defendant can challenge a court's subject matter jurisdiction under Rule 12(b)(1) in two ways. He may make a facial challenge to the sufficiency of the complaint's jurisdictional allegations as a matter of law, in which case, as with a Rule 12(b)(6) motion, all well-pleaded factual allegations are accepted as true and construed in the light most favorable to the plaintiff. *Garcia v. Copenhaver, Bell & Assocs.*, 104 F.3d 1256, 1261 (11th Cir. 1997); *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994); 2 James Wm. Moore *et al.*, *Moore's Federal Practice*, § 12.30[4], at 12-38 to 12-39 (3d ed.).

A defendant may also challenge the facts on which the complaint relies to allege jurisdiction, in which case the plaintiff is not entitled to have his allegations taken as true or to have any inferences drawn in his favor. *Sapperstein v. Hager*, 188 F.3d 852, 855-56 (7th Cir. 1999); 2 James Wm. Moore *et al.*, *Moore's Federal Practice*, § 12.30[4], at 12-38 to 12-40 (3d ed. 2000). To resolve a challenge to the facts, a court may receive and weigh evidence outside the allegations in the complaint to determine if it has subject matter jurisdiction over the case. Sapperstein, 188 F.3d at 855-56. In any case, the plaintiff has the burden of proving that subject matter jurisdiction exists. *Kontos v. United States Dep't of Labor*, 826 F.2d 573, 576 (7th Cir. 1987).

To the extent that the defendants raise a facial challenge to the Court's subject matter jurisdiction, that challenge is without merit. The Sierra Club filed this lawsuit under the provision of the CAA that states:

> Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf —
>
> * * *
>
> > (3) against any person who proposes to construct . . . [a] new . . . major emitting facility without a permit required under Part C of subchapter I of this chapter (relating to significant deterioration of air quality) [a PSD permit]. . . .
>
> The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation . . . and to apply any appropriate civil penalties. . . .

42 U.S.C. § 7604(a). It alleges that the PSD permit the defendants obtained in July 2001 to build the Plant expired when it did not commence construction within 18 months of receiving the permit and that construction of the Plant in light of that expiration violates the CAA. The defendants argue that because no official agency has declared their PSD permit expired or invalid, the existence of the permit deprives the Court of jurisdiction to hear suits under this provision of the CAA.

The defendants' argument is meritless. The Sierra Club has clearly alleged in the complaint that the defendants have proposed to construct the Plant, which all agree is a major emitting facility, after their PSD permit expired. Thus, it has stated a claim under § 7604(a)(3) and has presented a case or controversy over which the Court has subject matter jurisdiction. *See Grand Canyon Trust v. Tucson Elec. Power Co.*, 391 F.3d 979, 986 (9th Cir. 2004); *id.* at 985 ("Unau-

thorized construction of a power plant violates the Clean Air Act and provides grounds for a citizen suit under the Act's citizen suit provision."). That no agency has explicitly found that the defendants' permit has expired is irrelevant to the Court's jurisdiction; this lawsuit does not seek to review final agency action under the Administrative Procedure Act, 5 U.S.C. § 706(2), but is brought as a citizen suit under the CAA, 42 U.S.C. § 7604(a), which requires no final agency action. In addition, that the Sierra Club may not ultimately prevail in its claim does not deprive the Court of jurisdiction to hear the claim.

To the extent that the defendants have put the Sierra Club to its proofs to establish the Court's subject matter jurisdiction by a preponderance of the evidence, *see McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Meridian Sec. Ins. Co. v. Sadowski*, 441 F.3d 536, 541 (7th Cir. 2006), as the remainder of this order explains, the Sierra Club has, in fact, carried that burden by proving the defendants' proposed violation of the CAA.

B. Permit Shield

The defendants also argue that this case must be dismissed under Rule 12(b)(1) because 42 U.S.C. § 7661c(f) gives them "jurisdictional immunity" from this suit. That statute states, in pertinent part, "Compliance with a permit issued in accordance with this subchapter [Subchapter V of the CAA] shall be deemed compliance with section 7661 a of this title." The relevant portion of § 7661a(a) states, "[I]t shall be unlawful for any person to violate any requirement of a permit issued under this subchapter, or to operate . . . any other source required to have a permit under [the PSD program] . . . except in com-

pliance with a permit issued by a permitting authority under this subchapter."

To the extent that § 7661c(f) may limit the jurisdiction given by Congress in § 7604(a), and the Court expresses no opinion on whether it could, it does not limit the Court's jurisdiction in this case. By its terms, § 7661c(f) shields a facility from being found in non-compliance with a permit issued *under Chapter V of the CAA*, which deals with operating permits, not construction permits. *See* Sen. Rep. No. 101-228, 1990 U.S.C.C.A.N. 3385, 3731-32 (Dec. 20, 1989) ("Title V of the bill imposes a Federal requirement that major sources of air pollution, and certain other sources of air pollution, obtain operating permits. . . . New and modified major sources are already required to obtain construction permits under the New Source Review and Prevention of Significant Deterioration [PSD] provisions of the current Act."). Accordingly, the permit shield law protects a facility only against being found non-compliant with § 7661a, which speaks only to operation of facilities. Because § 7661c(f) is inapplicable to the cause of action alleged in the case at bar, it does not deprive the Court of jurisdiction.

C. Standing

The defendants also argue that the Sierra Club had no Article III standing when it filed this suit. They argue that the grievances of the Sierra Club members are too generalized, speculative, unfounded and foreclosed by the aforementioned permit shield. They also argue that the Sierra Club did not even know about its members' grievances until after it filed the lawsuit. They raise these arguments in the context of summary judgment under Rule 56.

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Spath v. Hayes Wheels Int'l-Ind., Inc.*, 211 F.3d 392, 396 (7th Cir. 2000).

The evidence shows that the Sierra Club has Article III standing to bring this suit and that the defendants are not entitled to dismissal for lack of subject matter jurisdiction as a matter of law. The doctrine of standing is a component of the Constitution's restriction of federal courts' jurisdiction to actual cases or controversies. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *see* U.S. Const. art. III, § 2. Standing contains three elements.

> First, the plaintiff must have suffered an injury in fact — an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical. . . . Second, there must be a causal connection between the injury and the conduct complained of — the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court. . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Id. at 560-61 (internal citations, quotations and footnotes omitted). An organization has standing to sue on behalf of its members if "its members would otherwise have standing to sue in their own right, the

interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000).

The Sierra Club has sufficiently established an injury in fact to at least one of its members. "[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Laidlaw*, 528 U.S. at 183 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)). In this case, Barbara McKasson ("McKasson"), a Sierra Club member, has submitted an affidavit stating just that — that if the defendants build the Plant without the appropriate permit, the resulting levels of pollution from the operating Plant will directly affect her use and enjoyment of the Rend Lake area, which she visits and plans to continue visiting at least every other year to fish, kayak or camp and which is located less than three miles from the proposed site of the Plant. She also states that the pollution that will be generated by the Plant constructed without an appropriate permit will also affect her use and enjoyment of her own property 45 miles from the proposed Plant site. This establishes an injury in fact of a Sierra Club member that is imminent and not conjectural or hypothetical.

The Sierra Club has also established a causal connection between McKasson's injury and pollution that will imminently emit from the Plant. "Traceability does not mean that plaintiffs must show to a scientific certainty that defendant's . . . effluent . . .

caused the precise harm suffered by the plaintiffs. . . . Rather, a plaintiff must merely show that a defendant discharges a pollutant that causes or contributes to the kinds of injuries alleged." *Piney Run Pres. Ass'n v. County Comm'rs of Carroll Co.*, 268 F.3d 255, 263-64 (4th Cir. 2001) (internal citations and quotations omitted). It is clear that the Plant proposes to emit harmful pollutants including particulate matter, sulfur dioxide, nitrogen oxide and mercury, that are highly likely to be in the air where McKasson recreates. McKasson stated in her affidavit that levels of those pollutants allowed by the PSD permit the Sierra Club believes has expired would cause the imminent injury of which she complains. Thus, McKasson's injury is fairly traceable to the defendants' construction of the Plant allegedly without an appropriate permit.

Redressability has also been demonstrated. McKasson stated that PSD permits for power plants issued after the defendants' PSD permit contain lower BACT emission levels (as they should since technology tends to make advancements, not regressions) and that if the Court were to halt construction of the Plant until the defendants obtained a new PSD permit, the BACT emission levels for the new PSD permit would be lower and her exposure to harmful pollutants at Rend Lake and at her home would be lessened. This is sufficient to establish the third element of standing, redressability. That the defendants sought independently to reduce emission levels to some unspecified level does not render McKasson's imminent injury non-redressable by Court action.[1]

---

[1] Because the Court has found that the Sierra Club has sufficiently established McKasson's standing to sue, it does not need to address the standing of Varena Owen.

The defendants have not seriously challenged the Sierra Club's standing to sue on behalf of its members. This is for good reason, because it is clear that the interests at stake in this lawsuit are directly related to the Sierra Club's purpose of preserving and protecting air quality in the United States and that this suit does not require the participation of individual Sierra Club members. Furthermore, that McKasson did not know about this lawsuit until after it was filed does not negate her standing to sue at the time the lawsuit was filed.

Because the Sierra Club has established its standing to bring this suit, the Court will not dismiss this suit for lack of standing.

IV. Analysis

A. Constitutionality

The defendants raise two arguments why the Court should dismiss this suit pursuant to Federal Rule of Civil Procedure 12(b)(6). When reviewing a Rule 12(b)(6) motion to dismiss, the Court accepts all allegations as true and draws all reasonable inferences in favor of the plaintiff. *Brown v. Budz*, 398 F.3d 904, 908 (7th Cir. 2005); *Holman v. Indiana*, 211 F.3d 399, 402 (7th Cir. 2000). The Court should not grant a motion to dismiss unless it appears beyond doubt that the plaintiff cannot prove his claim under any set of facts consistent with the complaint. *Brown*, 398 F.3d at 908-09; *Holman*, 211 F.3d at 405. "[I]f it is possible to hypothesize a set of facts, consistent with the complaint, that would entitle the plaintiff to relief, dismissal under Rule 12(b)(6) is inappropriate." *Brown*, 398 F.3d at 909 (internal quotations omitted); *see Kolupa v. Roselle Park Dist.*, 438 F.3d 713, 715 (7th Cir. 2006).

1. Due Process

The defendants argue that the Sierra Club cannot prevail in this action because they have a property interest in their PSD permit that cannot be terminated absent due process of law. The Sierra Club, on the other hand, contends that whatever property interest the defendants may have had in their PSD permit expired automatically by the terms of the permit and the applicable regulations and that if that interest has not yet expired, the process afforded in this legal proceeding suffices to satisfy due process requirements.

The defendants raise a procedural due process argument. The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. 14. "Procedural due process claims require a two-step analysis. The first step requires us to determine whether the plaintiff has been deprived of a protected interest; the second requires a determination of what process is due." *Doherty v. City of Chicago*, 75 F.3d 318, 322 (7th Cir. 1996).

The defendants' argument is nonsensical. To the extent that they have a property right in its PSD permit because it has not expired and continues to be valid, they will prevail in this litigation and will not be deprived of a property interest. On the other hand, if the Court finds that their permit has expired, the defendants have no protected property right of which they could be deprived. The automatic expiration of the permit pursuant to 40 C.F.R. §52.21(r)(2) would not be a deprivation of a property right but a limitation on the property right as it was initially created. Furthermore, to the extent that the defendants have a property right, the notice and opportunity to be

heard in this litigation certainly provides adequate process.

2. Separation of Powers

The defendants also argue that the citizen suit provision of the CAA violates the doctrine of separation of powers. The Constitution separates governmental powers in to three coordinate branches — executive, legislative and judicial. *Morrison v. Olson*, 487 U.S. 654, 693 (1988). The doctrine of separation of those three powers is violated when a law impermissibly undermines the power of one branch or disrupts the balance between the branches by preventing one from accomplishing its constitutional functions. *Id.* at 695.

The defendants rely on a dissenting opinion in *Friends of the Earth v. Laidlaw Environmental Services (TOC) Inc.*, 528 U.S. 167 (2000), in which Justice Scalia notes that citizen suit provisions, aimed at privately-selected law violators, may usurp the Executive Branch's authority and discretion to target law violators in a manner consistent with the public interest. *Id.* at 209-10; *see also id.* at 197 (Kennedy, J., concurring). The defendants then represent, "The CAA, as currently interpreted, does not run afoul of Article II. . . ." Def. Mot. Dism. at 18.

The schizophrenic nature of the defendants' argument stems from their fundamental misunderstanding of the Sierra Club's challenge. The Sierra Club is not challenging the propriety of the substance of the defendants' PSD permit as it was originally issued but the PSD permit's continuing validity. This is a perfectly appropriate challenge that falls squarely within the plain language of the CAA's citizen suit provision.

Furthermore, the defendants have not provided the Court with any binding authority or substantive argument for finding that the citizen suit provision of the CAA unconstitutionally usurps Executive Branch power. The Court agrees with the *United States v. American Elec. Power Service Corp.*, 137 F. Supp. 2d 1060, 1065 (S. D. Ohio 2001), that the CAA's citizen suit provision does not impermissibly intrude on the Executive Branch's powers, and to the extent that higher courts continue to entertain CAA citizen suits without questioning the citizen suit provision's constitutionality, *see, e.g., Grand Canyon Trust v. Tucson Elec. Power Co.*, 391 F.3d 979 (9th Cir. 2004), the Court finds no reason to find any unconstitutionality in this case.

B. Merits

The parties have filed cross-motions for summary judgment. Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Spath v. Hayes Wheels Int'l-Ind., Inc.*, 211 F.3d 392, 396 (7th Cir. 2000). The reviewing court must construe the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in favor of that party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Spath*, 211 F.3d at 396.

The only question in this case is whether the PSD permit issued to the defendants on July 3, 2001, remains valid. For the following reasons, the Court finds that it is not.

The PSD permit issued to the defendants expired automatically if the defendants did not commence construction within 18 months after receipt of the approval for the permit, if they discontinued construction for more than 18 months, or if the Plant was not completed within a reasonable amount of time. 40 C.F.R. § 52.21(r)(2). The Court need only address the first two expiration-triggering events in this order because the evidence demonstrates that the defendants did not commence construction within 18 months of obtaining the permit and discontinued construction for more than 18 months.

In order to have commenced construction, as that phrase is understood in the CAA context, a permittee must have either (1) begun a continuous program of actual physical on-site construction of the facility, to be completed within a reasonable time or (2) entered into binding contracts to undertake a program of actual construction of the source within a reasonable time that could not be cancelled without substantial loss. *See* 42 U.S.C. § 7479(2)(A); 40 C.F.R. § 52.21(b)(9). The Court will address each of these two avenues of commencing construction in turn.

1. Commencing a Program of Actual Physical On-site Construction

There is no evidence from which a reasonable fact-finder could find that the defendants began a continuous program of actual on-site construction within 18 months after receipt of the PSD permit.

As a preliminary matter, the Court turns to the issue of the 18-month period. The defendants make much of the specific expiration date of the 18-month period. The Sierra Club claims that the 18 months expired on January 3, 2003, exactly 18 months from

the date the permit was issued. The defendants want to account for a 30-day delay in the effective date of the decision under 40 C.F.R. § 124.15(b), a three-day extension to allow for service of the permit under 40 C.F.R. § 124.20(d), and a one-day "grace period" under 40 C.F.R. § 124.20(a). They use these extra periods to argue that the 18-month period ended on February 10, 2003. While the Court has doubts about whether the defendants are entitled to all of the additional time they claim, the Court declines to resolve the issue because even if they are correct in their calculations, they did not begin a continuous program of actual on-site construction before February 10, 2003.

The excavation activities of Alberici that began in January 2003 do not qualify as the beginning of a continuous program of actual on-site construction. As noted earlier in this order, the EPA defines "beginning actual construction" to mean:

> in general, initiation of physical on-site construction activities on an emissions unit which are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying underground pipework and construction of permanent storage structures. . . .

40 C.F.R. § 52.21(b)(11). The EPA construes "physical on-site construction" consistent with a memorandum issued by the agency which states, in pertinent part:

> We have interpreted physical on-site construction to refer to placement, assembly, or installation of materials, equipment, or facilities which will make up part of the ultimate structure of the source. In order to qualify, these activities must take place on-site or must be site specific. Place-

> ment of footings, pilings and other materials needed to support the ultimate structures clearly constitutes on-site construction. As stated in the preamble to the draft regulations, "it will not suffice merely to have begun erection of auxiliary buildings or construction sheds unless there is clear evidence (through contracts or otherwise) that construction of the entire facility will definitely go forward in a continuous manner". Activities such as site clearing and excavation work will generally not satisfy the commence construction requirements.

Memorandum from Edward E. Reich, Director of Stationary Source Enforcement, to David Kee, Chief Air Enforcement Branch Region V, Subject: "Commence Construction" under PSD, at 2 (July 1, 1978) ("Reich Memorandum").

It is true that the Reich Memorandum was not promulgated in the exercise of authority expressly delegated by Congress; it was not the result of the quintessential types of Congressional delegation — an adversarial proceeding or notice-and-comment rulemaking. It is therefore not binding on the courts under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001); *Christenson v. Harris Co.*, 529 U.S. 576, 587 (2000). However, it is the sort of informal agency opinion that is entitled to some respect according to its persuasiveness. *Mead*, 533 U.S. at 228; *Skidmore v. Swift & Co.*, 323 U.S. 134, 140-41 (1944). "'The weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pro-

nouncements, and all those factors which give it power to persuade, if lacking power to control.'" *Mead*, 533 U.S. at 228 (quoting *Skidmore*, 323 U.S. at 140). Furthermore, an agency's opinion as to the proper interpretation of an ambiguous regulation should be given deference. *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *see Christenson*, 529 U.S. at 588.

The Court finds the Reich Memorandum as a whole persuasive generally as to the interpretation of 42 U.S.C. § 7479(2)(A); 40 C.F.R. §§ 52.21(b)(9) & (11). The Reich Memorandum reflects detailed consideration of the question, and provides a relatively thorough analysis with numerous examples to guide application of the standards. The author held a position of knowledge and authority with respect to enforcement decisions and clearly contemplated the document to be used as a tool for enforcing the PSD permit requirements. Finally, there is no indication that the document is inconsistent with earlier or later EPA pronouncements. Thus, the Court finds the Reich Memorandum persuasive as to what constitutes "physical on-site construction" and should be given deference. *Auer*, 519 U.S. at 461.

The evidence, viewed in the light most favorable to the defendants, shows that the defendants' contract with Alberici in December 2002 may have been for excavation and for pouring concrete, but the actual work performed on the site involved only excavation and related activities. Furthermore, the excavation work ceased on February 14, 2003, and, with the exception of one day where workers showed up to work but did not do any work, from then until June 2003, an Alberici employee stayed at the job site to monitor the site but not to conduct any construction activities. The defendants did not do any more construction

work on the site after June 2003 until Lexington filled in the hole in the summer of 2004, and the defendants hired another company to do excavation and foundation work in September 2004.[2] The Alberici activities were simply not the kind of continuous or ongoing construction activities of a permanent nature such as those listed in 40 C.F.R. § 52.21(b)(11) or in the Reich Memorandum.

Under the applicable statutes and regulations, and consistent with the Reich Memorandum, excavation work alone without any further construction activity is simply not the type of action that would constitute "commencement of construction" sufficient to avoid expiration of the PSD permit. This is so even if the reason for letting the hole lie dormant is a perfectly legitimate business reason — the need to change boiler suppliers and therefore also boiler plans or the discovery of unexpected underground obstructions. In any case, there is no evidence that either before or after the excavation was stopped in February 2003, the construction of the facility as a whole was anticipated to "definitely go forward in a continuous manner." Reich Memorandum at 2. As discussed below, the Construction Memorandum evidenced no such concrete intentions, and the activity at the Plant site only amounts to the type of "clearing and excavation work" which the Reich Memorandum notes is not sufficient to constitute "physical on-site construction activities . . . of a permanent nature." 40 C.F.R. § 52.21(b)(11).

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[2] For the purposes of this motion only, the Court assumes without deciding that the September 2004 activities at the site, which involved the pouring of concrete, may be the type of "actual construction" activities contemplated by the regulations and the Reich Memorandum.

The defendants point to the Construction Memorandum, three power purchase agreements entered into after this litigation began, their $30 million investment in this project, and their "program of construction," including the excavation work done by Alberici, to argue that they have commenced construction. They specifically point out the extensive work they did before February 2003 on engineering and design for their specialized boilers and the numerous studies and analyses they did in preparation for building the Plant. While the Court is certain that the defendants were diligently working towards building the plant during the 18-months after receiving the permit, the bottom line is that the type of work they did was not "physical on-site construction activity" and did not avert automatic expiration of the defendants' PSD permit pursuant to law, regulation and the permit's terms.

The defendants advance a confused argument that 40 C.F.R. § 52.21(b)(9) does not provide the appropriate rule of law because it does not use the identical language of 42 U.S.C. § 7479(2)(A) to define "commencement of construction." The Court finds any difference in the language to be immaterial to this lawsuit and insufficient to render the regulation in conflict with or an unreasonable interpretation of the statute. The Court further notes that the defendants have not convincingly explained how 42 U.S.C. § 7479(2)'s use of the phrase "a continuous program of physical on-site construction" does not express a Congressional intent that the continuous program of construction be physical and on-site. Finally, the defendants argue that the statutory and regulatory language cannot possibly mean what it says because as a practical matter it would foreclose the development of coal-fired power plants in Illinois, especially

power plants that rely on the type of financing (non-recourse financing) the Plant relied on. If true, that is a matter the defendants should take up with their legislative representatives; until the law and regulations change, the Court is bound to apply them as they are written.

Alternatively, no reasonable jury could find that construction activities were not discontinued from February 14, 2003, to September 20, 2004, a period of more than 18 months. Thus, under 40 C.F.R. § 52.21(r)(2) and the terms of the permit, the permit became invalid. The evidence shows that one Alberici worker stayed at the worksite to monitor the security of the worksite for approximately the first four months and that no other actual work was done until more than 18 months later when Jones began excavation work again in September 2004.

In sum, the Court finds that no reasonable fact-finder could find that the defendants commenced a continuous program of actual physical on-site construction on the Plant within 18 months of receiving the permit or that they did not have a period of at least 18 months where construction activities were discontinued. In light of this finding, the Court need not address whether the Plant could be built within a reasonable time and will move to an examination of whether the defendants executed the type of contract that would prevent their PSD permit from expiring.

2. Binding Contracts

There is no evidence from which a reasonable fact-finder could find that the defendants entered into binding agreements to undertake a program of actual construction of the Plant to be completed within a reasonable amount of time.

As set forth earlier, a PSD permit will not expire if within 18 months of receipt of the permit, the permittee enters into "binding agreements or contractual obligations, which cannot be cancelled or modified without substantial loss to the owner or operator, to undertake a program of actual construction of the source to be completed within a reasonable time." 40 C.F.R. § 52.21(b)(9)(ii). The Construction Memorandum and Term Sheet do not qualify as the type of binding contractual obligation that would avert expiration of the PSD permit. Again, the Reich Memorandum provides a persuasive interpretation of "a contractual obligation to undertake a program of construction":

> In order to satisfy the commence construction requirements, a contractual obligation must be a site specific commitment. The types of activities which will be considered site specific for purposes of a contract are identified in question #1 above [defining what constitutes physical on-site construction]. Contracts for work on footings, pilings, and other site specific materials and equipment will clearly satisfy the requirement while contracts for site clearing and excavation will not. The legislative history clearly indicates that contracts for non site specific equipment, such as boilers, will typically not suffice, regardless of any penalty clauses contained in the contracts.
>
> A Contractual obligation for purposes of commencing construction must also be one which cannot be cancelled or modified without substantial loss. The PSD regulations provide guidance on determining whether a loss should be deemed "substantial". A loss which would exceed 10% of

> the total project cost will clearly be considered substantial. Whether a loss of less than or equal to 10% of the total project cost will be considered substantial will be determined on a case by case basis.

Reich Memorandum at 2.

Viewing the evidence in the light most favorable to the defendants, it is unreasonable to believe that the Alberici contract for pre-construction and basic foundation activities could not have been cancelled or modified without a substantial loss. Therefore, if any contract can be sufficient to constitute "commencement of construction" it must be the Construction Memorandum and Term Sheet.

It is true that the Construction Memorandum and Term Sheet constitute a binding agreement. The plain language of the agreement demonstrates that both sides have made firm commitments to each other to conduct certain pre-construction activities, including working together to reach an agreement on an EPC contract that contains the obligations and terms in the Term Sheet. That agreement also contains a termination penalty that binds the parties if no EPC contract is reached and that survives expiration of the agreement in the Construction Memorandum and Term Sheet.

The Construction Memorandum and Term Sheet are not, however, an agreement to undertake a program of actual construction of the Plant. The plain terms of the agreement require no more than working together to reach a further agreement — an EPC contract — and paying a penalty if no further agreement is reached. It clearly contemplates the execution of an EPC contract in the future that will contain

definite terms — which had not been decided as of December 2002 — and that will bind the parties at that time to undertaking a program of actual construction. The Construction Memorandum and Term Sheet themselves contain no commitment to physically build anything on-site, contain no agreed upon price and set forth no schedule for any actual, physical on-site construction. There is no evidence of any meeting of the minds as to these essential construction contract terms. Furthermore, it appears that such critical terms remain undecided as recently as the spring of 2006, when a Black & Veatch representative informed EnviroPower that the target price and schedule envisioned in the Term Sheet are not achievable and encouraged EnviroPower to hire another contractor if one could meet those targets. That the agreement is not a binding agreement to undertake actual construction becomes evident when one considers whether EnviroPower would be able to sue Black & Veatch under the agreement for failing to build the Plant. There is simply no term in the Construction Memorandum or Term Sheet that would allow such a suit to succeed; those documents provide no binding commitment to build.

The defendants argue that the Construction Memorandum and Term Sheet are types of contracts that are customary in the industry and are an accepted part of the industry norm and they point to testimony of several witnesses that those documents constitute a contract to build the Plant. That the documents are standard in the industry, however, does not mean they satisfy the requirements of 40 C.F.R. § 52.21(b)(9)(ii). Similarly, that several witnesses characterize the agreement as an "EPC contract" is not sufficient to negate the plain meaning of the language of the documents themselves, which clearly

evince a lack of any binding agreement to actually construct the Plant. Furthermore, a December 6, 2002, memo from an EnviroPower vice president to its president recognized that even EnviroPower officers did not view the Construction Memorandum and Term Sheet, executed several days earlier, as an EPC contract:

> To maintain the validity of the air permit, The EnviroPower Team planned to enter into a binding Engineer Procure Construction (EPC) or other agreement some time prior to January 3, 2003 and thus meet our commence construction requirement pursuant to [Permit] Article 19b. Current circumstances indicate an EPC Contract prior to January 3[, 2003] is not possible.

For these reasons, the Court finds that the commitments in the Construction Memorandum and Term Sheet simply do not amount to an agreement to undertake a program of actual construction. In light of this finding, the Court need not address whether the Construction Memorandum and Term Sheet could be cancelled or modified without substantial loss or whether the Plant could be constructed within a reasonable amount of time. The motion to exclude the testimony of Thomas M. McCauley (Doc. 77) is therefore rendered moot.

In sum, viewing all the evidence and drawing all reasonable conclusions in the defendants' favor, no reasonable factfinder could find that the defendants had begun a continuous program of actual on-site construction of the Plant or had entered into a binding agreement to undertake a program of actual construction of the Plant within 18 months of receipt of the PSD Permit. No reasonable factfinder could also fail to find that there was more than an 18-month

hiatus in construction activity. Thus, by statute, regulation and the permit terms, the PSD permit expired either in February 2003 or 18 months later, and continued construction of the Plant constitutes a violation of the CAA. For this reason, the Court will grant the Sierra Club's motion for summary judgment (Doc. 51)[3] and will deny the defendants' motion for summary judgment (Doc. 63) and motion to dismiss (Doc. 65).

V. Conclusion

For the foregoing reasons, the Court:

GRANTS the Sierra Club's motion for summary judgment (Doc. 51);

DENIES the defendants' motion for summary judgment (Doc. 63);

DENIES the defendants' motion to dismiss (Doc. 65);

DENIES as moot the defendants' motion to exclude the testimony of Thomas M. McCauley (Doc. 77);

DECLARES that the defendants' construction of the Plant after February 10, 2003 violates the CAA;

ENJOINS the defendants to stop actual construction of the Plant until they have obtained a valid PSD Permit;

VACATES the final pretrial conference and trial dates;

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[3] The defendants do not contest the Sierra Club's assertion that Khanjee shares liability in this case with EnviroPower and FCP.

DIRECTS that the parties shall submit further briefing on the appropriate amount of fine to be imposed, if any. The plaintiff's brief, which shall not exceed ten pages, shall be filed on or before November 17, 2006. The defendants shall have ten days to file a response brief, which shall not exceed ten pages, and the plaintiff shall have ten days to file a reply brief, which shall not exceed five pages; and

DIRECTS the Clerk of Court to enter judgment accordingly at the close of the case.

IT IS SO ORDERED.

Dated: October 17, 2006

/s/ J. Phil Gilbert
J. PHIL GILBERT
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

December 19, 2008

No. 06-4045

SIERRA CLUB,
Plaintiff-Appellee,
v.
FRANKLIN COUNTY POWER OF ILLINOIS, LLC, formerly known as ENVIROPOWER OF ILLINOIS, LLC, ENVIROPOWER, LLC, and KHANJEE HOLDING (US) INC.,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Illinois.
No. 05 C 4095

Before
WILLIAM J. BAUER, *Circuit Judge*
KENNETH F. RIPPLE, *Circuit Judge*
ANN CLAIRE WILLIAMS, *Circuit Judge*

ORDER

J. PHIL GILBERT, Judge.

On consideration of the petition for panel rehearing and for rehearing en banc filed by Defendants-

Appellants on November 12, 2008, all members of the original panel have voted to DENY the petition for rehearing. No judge in regular active service requested a vote on the petition for rehearing en banc.

Accordingly, the petition for rehearing is DENIED.

No. 08-1304

IN THE

Supreme Court of the United States

FRANKLIN COUNTY POWER OF ILLINOIS, LLC, ET AL.,
Petitioners,

v.

SIERRA CLUB,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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May 2009

QUESTION PRESENTED

Whether the Sierra Club submitted sufficient evidence to show that one of its members, Barbara McKasson, would be injured by petitioners' construction, without a valid Clean Air Act permit, of a large, coal-fired power plant three miles from a park that McKasson regularly visits; and, if so, whether McKasson's injury is traceable to petitioners' conduct and could be redressed by an injunction prohibiting construction of the plant until petitioners obtain a valid permit.

RULE 29.6 STATEMENT[1]

Respondent Sierra Club has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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[1] Petitioners' Rule 29.6 Statement erroneously states that petitioner EnviroPower, LLC is a Kentucky limited liability company and that Franklin County Power of Illinois, LLC, f/k/a EnviroPower of Illinois, LLC (Franklin County Power) is an Illinois limited liability company. The Kentucky Secretary of State administratively dissolved EnviroPower, LLC on November 1, 2008 (*see* Ky. Sec'y of State, *Online Business Database*, http://apps.sos.ky.gov/business/obdb (search for "EnviroPower, LLC")), and the Illinois Secretary of State involuntarily dissolved Franklin County Power on February 13, 2009 (*see* Ill. Sec'y of State, *Department of Business Services Database*, http://www.ilsos.gov/corporatellc/ (search for "Franklin County Power")).

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INTRODUCTION

Petitioners ask this Court to overturn a decision of the Seventh Circuit prohibiting them from constructing a large, coal-fired power plant under authority of a Clean Air Act permit that expired in 2003. Although petitioners do not dispute that the plant would be a major source of air pollution and would be built only three miles from a park frequented by at least one Sierra Club member, Pet. App. 3a, 10a-11a, they nevertheless argue that the Sierra Club lacks standing to challenge construction of the plant.

Petitioners do not identify any split among the circuits or unsettled question of federal law that would warrant this Court's review. Instead, they argue that questions of Article III standing are important enough to justify a grant of certiorari "even in the absence of a clear conflict among the circuits." Pet. 13 n.5. The relevant standing analysis, however, is already well-established by this Court's case law (including its decision just this Term in *Summers v. Earth Island Institute*, 129 S. Ct. 1142 (2009)), and the only question posed by the petition is therefore the fact-bound question whether the Seventh Circuit correctly applied the established precedent to the particular evidence in this case. Certiorari is rarely appropriate where, as here, "the asserted error consists of . . . the misapplication of a properly stated rule of law." S. Ct. R. 10.

In any event, the Seventh Circuit reached the only reasonable conclusion based on the undisputed facts. The court relied on the affidavit of Sierra Club member Barbara McKasson, who stated that she would reduce her use of the Rend Lake area if a major coal-fired power plant that did not comply with current emission limits were built nearby. McKasson's affidavit is indistinguishable from the affidavits this Court held sufficient to sup-

port standing in *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 528 U.S. 167 (2000). Moreover, uncontested evidence submitted by the Sierra Club established that requiring petitioners to obtain a new permit that complied with recent advances in pollution-control technology would substantially reduce or eliminate McKasson's injury.

Although framed as an attack on the Sierra Club's standing, petitioners' real complaint is with the Clean Air Act's citizen-suit provision, which they contend allows "private groups with self-serving agendas" to "prevent needed and beneficial energy plants from being built." Pet. 3, 25. Congress, however, chose to provide a cause of action against "any person who proposes to construct . . . [a] major emitting facility without a permit." 42 U.S.C. § 7604(a)(3). Because petitioners no longer press their objection to the district court's conclusion that their permit has expired, the plant they propose to construct would necessarily be "without a permit" under the Clean Air Act. Petitioners' policy concerns about the impact of the statute on the power industry should be directed to Congress, not to this Court.

STATEMENT

In 2000, Franklin County Power applied for a permit to build a coal-fired power plant in Benton, Illinois. Pet. App. 4a. Because the plant would be a "major emitting facility" under the Clean Air Act, the company was required to obtain a permit from the Illinois Environmental Protection Agency (IEPA) before it could begin construction. Pet. App. 3a-4a. The required permit, known as a "Prevention of Significant Deterioration" or "PSD" permit, sets limits on emissions based on "best available control technology" standards for air pollutants. Pet. App. 3a; *see* 42 U.S.C. § 7475(a).

The IEPA issued a PSD permit to Franklin County Power on July 3, 2001. Pet. App. 4a. Once the permit was issued, the Clean Air Act required the company to act quickly to preserve its right to construct the plant. Under the Act and its implementing regulations, PSD permits automatically expire if a company does not "commence" construction of a permitted plant within 18 months of the permit's issuance, discontinues construction during any 18-month period, or does not complete construction within a reasonable time. Pet. App. 3a; *see* 40 C.F.R. § 52.21(r)(2), 124.5(g)(2) These timeliness requirements provide an "important assurance" that power plants keep pace with updated emission limits and rapidly evolving pollution-control technology. *See In re W. Suburban Recycling & Energy Ctr., L.P.*, 8 E.A.D. 192 (E.A.B. 1999). Without them, a permit would lock in place existing levels of emissions, allowing companies to build plants long after the limits are considered unacceptable and the control technology has become obsolete. *See id.*

Franklin County Power failed to comply with the law's timeliness requirements in several ways:

First, the company did not commence construction of the plant within 18 months of issuance of the permit. Because the IEPA issued the company's permit on July 3, 2001, the last day for it to begin construction was January 3, 2003. Pet. App. 16a-17a. The company, however, did no work on the site until, at the earliest, January 8, 2003, five days after the permit had expired. Pet. App. 18a-19a.[2]

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[2] In the district court, the company argued that it was entitled to various extensions that pushed its deadline past January 3, 2003. Pet. App. 16a n.3. On appeal, however, the company abandoned this argument. *Id.* Thus, the "operative" date in the Seventh Circuit was January 3, 2003. *Id.*

Second, after the company began work on the site in January 2003, it did no more than dig a hole. Pet. App. 19a. Because "commencement" under the Clean Air Act requires the start of "physical on-site construction" of the emission source, the company would not have timely commenced construction even if it had begun digging the hole before the January 3, 2003, deadline. Pet. App. 18a-19a; *see* 42 U.S.C. § 7479(2)(A).[3]

Third, just over a month after digging began, the contractor ceased all work on the site because of a payment dispute. After the company also failed to pay its rent, the company's landlord filled in the hole the company had dug. Pet. App. 19a, 43a. Thus, even if the company had commenced construction before expiration of the permit, that construction would not have been a "*continuous* program of physical on-site construction," as required by the Clean Air Act, 42 U.S.C. § 7479(2)(A) (emphasis added). *See* Pet. App. 19a.

Fourth, after work ceased in February 2003, the company did not start digging another hole until more than 18 months later, on September 29, 2004. Pet. App. 5a. Regardless of whether work had commenced in January or February of 2003, the permit would have therefore subsequently expired after 18 months of inactivity. Pet. App. 20a.

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[3] As an alternative to physical on-site construction, the Clean Air Act considers an owner to have commenced construction if the owner has "entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of construction of the facility to be completed within a reasonable time." 42 U.S.C. § 7479(2)(A). Both the district court and Seventh Circuit concluded that petitioners had not entered into such a contract, Pet. App. 20a-27a, and petitioners do not raise the issue in the petition.

With a partially dug hole being the only progress made on the site in almost four years, the IEPA on November 19, 2004, made a "preliminary finding" that the company's PSD permit had expired. Pet. App. 5a, 44a. Nevertheless, the company continued to maintain that its permit was valid and that nothing prevented it from proceeding with construction of the plant. Pet. App. 10a. To stop the company from going forward with construction under an expired permit and outdated control-technology standards, the Sierra Club filed suit under the Clean Air Act's citizen-suit provision. 42 U.S.C. § 7604(a)(3). That provision states that "any person" may bring a civil action to prevent construction of a "new or modified major emitting facility without a permit" or a facility that is alleged to be "in violation of any condition of such permit." *Id.*

After discovery, the district court granted the Sierra Club's motion for summary judgment. The court first rejected petitioners' argument that the Sierra Club lacked standing, holding that at least one Sierra Club member, Barbara McKasson, was injured by petitioners' proposal to construct the plant using outdated "best available control technology" standards. Pet. App. 51a. Turning to the merits, the court held that the company's permit automatically expired when it failed to commence construction within 18 months of the permit's issuance and that, even if construction had commenced on time, the permit would have subsequently lapsed after 18 months of inactivity. Pet. App. 56a. The district court therefore granted an injunction prohibiting petitioners from continuing to construct the proposed plant "until they have obtained a valid PSD Permit." Pet. App. 67a.

On appeal in the Seventh Circuit, petitioners again argued that the Sierra Club lacked standing to pursue its claims. Like the district court, the Seventh Circuit disagreed, holding that McKasson's interests were suffi-

cient to give the group standing. Pet. App. 7a-14a. The Seventh Circuit also agreed with the district court's decision to enjoin construction of the proposed plant. The court concluded that petitioners' permit to build the plant had expired and therefore that continued construction would be "without a permit" and in violation of the Clean Air Act. Pet. App. 15a. Moreover, because petitioners had not complied with the time limits on the face of the permit, the court concluded that construction would be "in violation of [a] condition" of the permit. *Id.*

In the petition, petitioners no longer challenge the lower courts' decision that their permit has expired. The only question here is whether the Sierra Club has standing to challenge petitioners' construction of the proposed plant with an expired permit.

REASONS FOR DENYING THE WRIT

I. The Relevant Standard for Determining Standing in This Case Is Well-Established and Undisputed.

Although petitioners claim that the Seventh Circuit's decision that the Sierra Club had standing "plainly ignored" established precedent, the standard they urge is precisely the standard applied by the court. The undisputed test, as set forth by this Court in *Laidlaw* and applied by both the district court and Seventh Circuit below, requires the Sierra Club to show that at least one of its members "(1) . . . has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that

the injury will be redressed by a favorable decision." *Laidlaw*, 528 U.S. at 180-81.[4]

In *Laidlaw*, plaintiff environmental groups challenged a water-treatment plant's pollution emissions under the Clean Water Act, which has a citizen-suit provision very similar to the provision at issue in this case. *Id.* at 174-75, 177; *see Friends of the Earth v. Consol. Rail Corp.*, 768 F.2d 57, 63 (2d Cir. 1985) (noting that the citizen-suit provision of the Clean Water Act "was explicitly modeled on" and is a "clear parallel" of the Clean Air Act's provision). The defendant argued that the groups lacked standing to challenge pollution emissions in the absence of "demonstrated proof of harm to the environment." *Id.* at 181. This Court rejected that argument, holding that "[t]he relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff." *Id.* Like the Sierra Club here, the plaintiff environmental groups in *Laidlaw* showed this type of injury with affidavits of members who used the affected areas for sports and recreation and who stated that they would be less likely to continue using those areas if the challenged pollution were to continue. *Id.* at 181-83.

Earlier this Term, this Court in *Summers*, 129 S. Ct. 1142, reaffirmed the continuing applicability of *Laidlaw*.

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[4] "An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Laidlaw*, 528 U.S. at 181. Petitioners do not argue that the issues are not germane to Sierra Club's purpose or that participation of individual Sierra Club members would be required. Therefore, there is no dispute that Sierra Club has standing to challenge construction of the plant as long as at least one of the organization's members would have standing.

There, environmental organizations challenged a United States Forest Service regulation that deprived them of the opportunity to comment on a timber sale at a forest site known as Burnt Ridge. *Id.* at 1147-48. In support of standing, the organizations submitted the affidavit of Ara Marderosian, a member who stated that he had repeatedly visited Burnt Ridge, that he had plans to do so again, and that the challenged regulation harmed his interests in viewing the area's flora and fauna. *Id.* at 1149-50. Before the case reached this Court, however, the parties had settled their dispute over the Burnt Ridge timber sale. *Id.* This Court held that the settlement deprived the plaintiffs of standing because there was no longer any identified "concrete application that threatens imminent harm to Marderosian's interests." *Id.* At the same time, it reaffirmed the principle that a plaintiff can challenge environmental harm that "affects the recreational or even the mere esthetic interests of the plaintiff." *Id.* Indeed, the Forest Service conceded that Marderosian's affidavit was enough to establish his standing to challenge the Burnt Ridge timber sale. *Id.* at 1149.

Petitioners identify no circuit split on the proper standard to apply in cases like this one and no decision that even arguably conflicts with *Laidlaw* or with the decision below. Those federal courts of appeals that have addressed the question have universally rejected any requirement that plaintiffs show evidence of actual environmental harm and have accepted as sufficient affidavits establishing that the challenged emissions will affect the plaintiffs' use and enjoyment of the environment. *See, e.g., Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 163-64 (4th Cir. 2000) (en banc) ("Courts are not at liberty to write their own rules of evidence for environmental standing by crediting only direct evidence of impairment. Such elevated evidentiary

hurdles are in no way mandated by Article III."); *see also Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1149 (9th Cir. 2000). The one district court decision petitioners identify, which required plaintiffs to produce "evidence regarding the magnitude of the diminished air quality," predates *Laidlaw* and cannot be reconciled with *Laidlaw*'s holding that no "demonstrated proof of harm to the environment" is required. *Ogden Projects, Inc. v. New Morgan Landfill Co.*, 911 F. Supp. 863, 869-70 (E.D. Pa. 1996).

Because the proper standard, as set forth in *Laidlaw* and *Summers*, is essentially undisputed, the only questions raised by the petition are the questions posed by the particular facts of the case—namely, whether the Sierra Club has shown that one of its members, Barbara McKasson, would be injured by petitioners' construction of a power plant in Benton, Illinois without a valid permit, and whether that injury is both traceable to petitioners' conduct and redressable by the federal courts. The answer to those questions depends, as the Seventh Circuit recognized, on the "specific facts" of the case and on the "manner and degree of evidence" presented. Pet. App. 7a (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)); *see also Ecological Rights Found.*, 230 F.3d at 1149 (holding that environmental standing cases "are not to be evaluated in a one-size-fits-all, mechanistic manner"). Although petitioners may disagree with the conclusion reached by the Seventh Circuit, they have no choice but to acknowledge that the case involves, at most, "misapplication of standing principles established by this Court." Pet. 24. Under this Court's Rule 10, a petition is "rarely granted" when the asserted error consists of an alleged "misapplication" of a settled rule of law. There are no exceptional circumstances here that justify making this case the rare exception.

II. The Seventh Circuit's Decision Was Correct.

Even if error correction were a valid basis for seeking this Court's review, certiorari would be inappropriate here because the result reached by the Seventh Circuit was not only reasonable, but required by this Court's standing jurisprudence.

1. The first prong of the standing analysis requires the plaintiff to show an "injury in fact." *Laidlaw*, 528 U.S. at 180-81. In concluding that McKasson would be injured by construction of the plant, the Seventh Circuit relied on this Court's decisions in *Laidlaw* and other cases holding that "environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity." Pet. App. 7a-8a (quoting *Laidlaw*, 528 U.S. at 183); *see also Sierra Club v. Morton*, 405 U.S. 727, 735 (1972). These are precisely the allegations in McKasson's affidavit. The affidavit states that McKasson visits Rend Lake, a beautiful natural area less than three miles from the proposed site of the power plant, to fish, kayak, camp, and enjoy the natural beauty and clean environment. Pet. App. 8a. McKasson states that she has visited Rend Lake with her family every other year since 1987 and plans to continue to do so indefinitely. Pet. App. 8a, 50a. She also states that she would stop visiting the park if a major polluting power plant with an outdated permit were constructed three miles away. *Id.*

McKasson's affidavit is indistinguishable from affidavits held sufficient to support standing in *Laidlaw*. For example, *Laidlaw* held that the affidavit of Kenneth Lee Curtis established his standing to challenge illegal river discharges under the Clean Water Act. *Laidlaw*, 528 U.S. at 181-82. Curtis stated in his affidavit that he "would like to fish, camp, swim, and picnic in and near

the river between 3 and 15 miles downstream from the facility, as he did when he was a teenager, but would not do so because he was concerned that the water was polluted by [the defendant's] discharges." *Id.* Similarly, as already mentioned, *Summers* involved an affidavit by Ara Marderosian that all parties agreed was sufficient to support standing. *See supra* at 8. The federal courts of appeals have relied on similar affidavits to find standing in environmental cases. *See, e.g., N.Y. Pub. Interest Research Group v. Whitman*, 321 F.3d 316 (2d Cir. 2003) (allegations that members residing within a few miles of defendants' facility were concerned about pollutant emission levels if the facility did not comply with the Clean Air Act); *Gaston Copper Recycling*, 204 F.3d at 153 (allegations that members would make greater recreational use of a waterway except for concern over the defendant's discharges); *Texans United for a Safe Econ. Educ. Fund v. Crown Cent. Petroleum Corp.*, 207 F.3d 789, 792 (5th Cir. 2000) ("[B]reathing and smelling polluted air is sufficient to demonstrate injury-in-fact and thus confer standing under the [Clean Air Act].") (internal quotation omitted). Petitioners identify no decisions that hold otherwise.

Nor have petitioners identified any evidence contradicting the statements in McKasson's affidavit about the proposed plant's pollutants and their likely effect on her use and enjoyment of Rend Lake. Instead, petitioners criticize McKasson's affidavit on the ground that it fails to "specify which pollutant would cause what harm." Pet. 10. This claim is irrelevant in light of *Laidlaw*'s holding that plaintiffs need not produce "demonstrated proof of harm to the environment." 528 U.S. at 181. It is also false. Contrary to petitioners' contention, McKasson's affidavit stated her specific concerns about the health effects and reduced visibility caused by mercury, sulfur dioxide, and nitrogen oxides that would be emitted by

the plant. Pet. App. 10a-11a, 51a. Indeed, petitioners have never disputed that the plant would be a source of pollution in the local environment. Pet. App. 3a, 10a-11a. It is hardly a stretch to conclude that a "major emitting facility" like the large, coal-fired power plant petitioners propose would have a negative effect on a natural area less than three miles away.

The only evidence petitioners identify in regard to McKasson's affidavit is her statement, elicited in a deposition, that she did not learn about this case until after the Sierra Club filed suit. Pet. 7, n.3. That statement, though true, is irrelevant. Petitioners do not explain why McKasson's knowledge of the lawsuit on the date of filing has anything to do with the question whether she would be injured. Regardless, McKasson faced a threat of injury on the date the lawsuit was filed that was caused by petitioners' conduct and was redressable by a court. Moreover, McKasson's affidavit establishes that she is concerned about air pollution, both in general and from the proposed plant, has been active in opposing construction of other coal-fired power plants, and moved away from Chicago for the purpose of escaping the city's smog. If petitioners' intend to imply that McKasson is not seriously interested in the controversy, they are wrong.[5]

2. Petitioners' only argument for distinguishing *Laidlaw* is the unfounded contention that, unlike the plaintiffs there, the Sierra Club has not alleged that any environ-

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[5] Sierra Club also submitted the affidavit of another Sierra Club member, Verena Owen, in support of its claim for standing. Neither the district court nor the Seventh Circuit reached the question of Owen's standing because both courts found that Sierra Club sufficiently established that McKasson had standing to sue. Pet. App. 51a; Pet. App. 13a. If this Court were to hold that McKasson lacks standing, it should remand for a determination of Owen's standing.

mental law or standard has been violated. Petitioners argue that, because the IEPA granted Franklin County Power a PSD permit eight years ago, the Sierra Club's claims stem from "emission limitations that the federal and state environmental agencies deemed sufficient to protect air quality under the [Clean Air Act]." Pet. 16. Without any citation to authority, petitioners conclude that "[p]ersonal fears of emissions that comply with federal clean air standards . . . cannot be credited as a 'realistic' or 'reasonable' basis for standing." *Id.*

Petitioners' argument ignores the fact that PSD permits do not remain valid indefinitely. *See* 40 C.F.R. § 52.21(r)(2). The Clean Air Act and its implementing regulations state that if construction is not commenced within 18 months of receiving a permit, is discontinued for 18 months or more, or is not completed within a reasonable time, the facility may not be constructed with the emission standards in the permit. *Id.* Once a PSD permit has expired, an agency must make new determinations of best available control technology standards based on the current level of air pollution in the locality of the plant and advances in the development of pollution-control technology. *See In re N.Y. Power Auth.*, 1 E.A.D. 825, 826 (E.A.B. 1983) (The Clean Air Act's statutory time limit "is one of the means of ensuring that the requirement for best available control technology . . . involves reasonably current pollution controls.").

Here, both the district court and the Seventh Circuit agreed that the permit automatically expired when petitioners did not "commence" construction within 18 months after the permit was granted or, at the latest, when petitioners discontinued construction for more than 18 months.[6] The petition does not challenge these

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[6] Because both the district court and the Seventh Circuit determined that the permit expired under the first two prongs, neither

aspects of the decisions below. If petitioners proceed with constructing the plant, as they would do absent the injunction, they would be constructing a plant without a valid permit and therefore would have violated the Clean Air Act. Petitioners are thus wrong to claim that their expired permit gives them authority to build the proposed plant.

Similarly, petitioners' claim that the challenge is a "collateral attack" on the IEPA's permit decision fails for the simple reason that there is no existing permit to attack. The two district court decisions on which petitioners rely held that a plant should not be penalized for compliance with a "facially valid state permit." *Nat'l Parks Conservation Ass'n v. Tenn. Valley Auth.*, 175 F. Supp. 2d 1071, 1078 (E.D. Tenn. 2001); *see Families Concerned About Nerve Gas Incineration v. U.S. Dep't of Army*, 380 F. Supp. 2d 1233, 1257 (N.D. Ala. 2005). Even assuming these decisions were correct, they would not be applicable here. Petitioners' permit in this case is not facially valid—it is facially *in*valid. A challenge to construction of a plant without a valid permit is exactly the sort of case the Clean Air Act's citizen-suit provision contemplates. *See* 42 U.S.C. § 7604(a)(3) (providing a cause of action against "any person who proposes to construct . . . [a] major emitting facility without a permit").

In any case, the applicability of the Clean Air Act in these circumstances is a question of the statute's scope and therefore goes, at most, to the merits rather than to standing. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 92 (1998). Whether an agency has approved construction of a plant is irrelevant to the question whether the construction would injure the plaintiff. *See Lujan*, 504 U.S. at 573 n.7 ("[U]nder our case law, one living ad-

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court reached the question whether construction could be completed within a reasonable time.

jacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement . . . ."); *LaFleur v. Whitman*, 300 F.3d 256, 270 (2d Cir. 2002) (finding standing to challenge pollution that complied with national air-quality standards).

3. As petitioners note, the second two prongs of the standing inquiry—traceability and redressability—are closely related to the issue of injury. Pet. 18. Here, little additional analysis is necessary. McKasson's injuries are "fairly traceable" to construction of the plant because constructing a plant that does not comply with current emission standards would cause the environmental and recreational harms set forth in McKasson's affidavit. Similarly, McKasson's injuries are redressable by a favorable decision because requiring the plant to abide by current emission standards would reduce or eliminate her exposure to the source of her injury.

Petitioners challenge redressability on the ground that, even if they are required to obtain a new permit, there is no guarantee that the permit would impose more stringent pollution limitations than were imposed by their expired 2001 permit. The reason that the Clean Air Act imposes strict time limits for construction of permitted plants, however, is to assure that new plants keep up with evolving pollution-control technology. *See W. Suburban Recycling & Energy Ctr.*, 8 E.A.D. 192; *N.Y. Power Auth.*, 1 E.A.D. 825. As the Seventh Circuit recognized, technology improvements over the past nine years guarantee that a new permit would impose more stringent pollution emission standards on petitioners. Pet. App. 12a-13a. Indeed, the Sierra Club submitted evidence showing that newer permits granted by the IEPA imposed *significantly* more stringent limits than petitioners' 2001 permit. Pet. App. 13a. Petitioners did not contest this evidence in the district court and, aside

from vaguely protesting that "each coal-fired power plant has unique characteristics," Pet. 21 n.7, have no answer to it here.

Regardless, there is no question that the district court's injunction will, at a minimum, give McKasson significant, if only temporary, relief. Because petitioners' PSD permit has expired, they have no right to build the proposed plant unless and until a new permit is obtained. The district court's order thus allows McKasson to enjoy the benefits of the park, at least for the time being, without *any* pollution from the power plant. Moreover, petitioners are not guaranteed a new permit, and, if they fail to obtain one, McKasson's temporary relief, sufficient in itself to establish standing, would be made permanent. Thus, although petitioners argue that the Sierra Club's arguments are "speculative," it is actually petitioners who are speculating. The possibility that petitioners may apply for a new permit and that the IEPA may grant one sometime in the future is not sufficient to defeat the Sierra Club's standing to challenge construction *now*.

III. Petitioners' Predictions About the Implications of the Decision Below Amount to Nothing More Than Policy Disagreements With the Clean Air Act.

Petitioners devote a significant portion of their brief to policy arguments, contending that allowing this case to proceed would "clog[] the courts with questionable citizen suits," that would "prevent needed and beneficial energy plants from being built." Pet. 3. Even if this were true, it would constitute, at most, an argument for repeal of the Clean Air Act's citizen-suit provision. Congress intended the Clean Air Act to allow for "economic growth . . . in a manner consistent with the preservation of existing clean air resources." 42 U.S.C. § 7470(3). The citizen-suit provision is part of Congress's attempt to

balance the sometimes competing goals of growth and clean air, designed to "both goad the responsible agencies to more vigorous enforcement of the anti-pollution standards and, if the agencies remained inert, to provide an alternative enforcement mechanism." *Proffitt v. Rohm & Haas*, 850 F.2d 1007, 1011 (3d Cir. 1988) (internal quotation omitted). In this process, "Congress made clear that citizen groups are not to be treated as nuisances or troublemakers but rather as welcomed participants in the vindication of environmental interests." *Consol. Rail Corp.*, 768 at 63 (internal quotation omitted). Petitioners are free to ask Congress to rewrite the statute, but the plain language of the law as currently written grants the Sierra Club the right to challenge construction of a power plant that lacks a valid permit.

In any event, petitioners' catastrophic predictions about the impact of the Seventh Circuit's decision are unsupported by the record and seriously overblown. The decision below holds only that petitioners' permit has expired and requires only that petitioners refrain from constructing their proposed plant "until they have obtained a valid PSD Permit." Pet. App. 67a. Petitioners are therefore required to do no more than to live up to their legal obligations under the Clean Air Act. Petitioners' argument that the Seventh Circuit's decision will slow down the production of "needed and beneficial energy plants" is particularly disingenuous given that it is petitioners' long delay in constructing the plant that caused its permit to lapse in the first place.

For the same reason, petitioners' argument that the decision interferes with the judgment of the agencies charged with regulating power-plant emissions gets things backward. Petitioners are free to seek a new permit from the IEPA at any time, in which case the agency will decide whether and under what conditions the plant should be built. Far from allowing an end-run around the

agency, the injunction thus ensures that the IEPA will have an opportunity to exercise its discretion before the proposed plant is constructed.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

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[7] Petitioners' speculation that the IEPA has deferred issuing a final ruling on the validity of the permit in deference to this litigation is unsupported by anything in the record and has no basis in law.

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(3)

No. 08-1304

IN THE

Supreme Court of the United States

FRANKLIN COUNTY POWER OF ILLINOIS, LLC, FORMERLY KNOWN AS ENVIROPOWER OF ILLINOIS, LLC; ENVIROPOWER, LLC; AND KHANJEE HOLDING (US), INC.,

Petitioners,

v.

SIERRA CLUB,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF OF PETITIONER

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INTRODUCTION[1]

Petitioners demonstrated that the decision below conflicts with this Court's constitutional standing decisions requiring a plaintiff to show actual injury that is traceable to the defendant's conduct and redressable by the requested relief. Respondent's opposition fails to show otherwise. Respondent also fails to refute petitioners' showing that this case raises a recurring and important question of federal law because the court of appeals' dilution of this Court's standing principles in the context of Clean Air Act ("CAA") citizen suits threatens the entire electric utility industry by turning over to private parties the function of enforcing the environmental laws.

At the end of the day, the court of appeals' failure to hold respondent to the specific showings and burden of proof that this Court has set forth in its standing decisions ignores the legitimate agenda that Congress has prescribed for citizen suits, which is to support, but not supplant, the authority of federal and state environmental agencies. Here, petitioners have been prevented from constructing a state-of-the-art clean

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[1] Petitioners' counsel learned after the petition was filed that EnviroPower, LLC had been tentatively administratively dissolved by the Kentucky Secretary of State on November 1, 2008, and that Franklin County Power of Illinois, LLC, f/k/a EnviroPower of Illinois, LLC had similarly been involuntarily dissolved by the Illinois Secretary of State on February 13, 2009. These actions are minor administrative matters arising from oversights in light of personnel changes. Even prior to the filing of respondent's brief, the companies had begun the process of addressing these matters. As of this filing, the necessary timely steps have been taken to rectify the problem, which should be corrected in a matter of days. The validity of the corporate entities is not, and has never genuinely been, in question.

coal facility, even though the state and federal agencies have taken no action to invalidate the properly-issued permit. If the decision below is allowed to stand, other power plant builders will inevitably suffer the same fate at the hands of similar suits and meaningful public control over enforcement of the environmental laws will be lost.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT.

Petitioners demonstrated (Pet. at 12-24) that the decision below merits review because it conflicts with this Court's decisions requiring a plaintiff to allege "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 342 (2006) (internal quotation marks omitted). Respondent's attempt to reconcile the court of appeals' decision with those holdings is unavailing.

Respondent argues that there is no conflict between the decision below and this Court's decisions because the court of appeals cited those decisions in its rulings. See, *e.g.*, Opp. at 10. To be sure, as petitioners acknowledged, see Pet. at 14, the Seventh Circuit paid lip service to this Court's standing decisions. Federal courts, however, must do more than merely parrot constitutional principles that this Court has established. They must adhere to them. The Seventh Circuit failed to do so here, in three respects.

1. Petitioners demonstrated that the Seventh Circuit's decision conflicts with this Court's holding that plaintiffs cannot satisfy the "injury in fact" requirement of this Court's standing framework by

pointing to "subjective apprehensions" that do not demonstrate a "realistic threat" of the alleged future injury. Pet. at 15-18 (internal quotation marks omitted) (citing *Friends of the Earth, Inc.* v. *Laidlaw Env'l Servs. (TOC), Inc.*, 528 U.S. 167, 184 (2000)). Petitioners showed that Barbara McKasson's feared injuries to her aesthetic and recreational interests are rooted in mere "subjective apprehensions" that are not realistic because they stem from emission limitations that the federal and state environmental agencies deemed sufficient to protect air quality under the CAA. *Id.* at 16-17.

Respondent does not dispute that the injuries it asserts to establish standing are alleged injuries to McKasson's aesthetic and recreational interests that stem from the emission limitations in the 2001 permit – and not from any "illegal" discharges by petitioners or non-compliance with environmental standards, as in *Laidlaw* and the other cases that respondent cites. Opp. at 10-11; see also *id.* at 11-12 (emphasizing that the power plant is a "source of pollution" that will have a "negative effect" on the environment and noting that McKasson's "specific concerns" derive from the "proposed plant's pollutants"). Instead, respondent argues (*id.* at 10-11) that harm to aesthetic and recreational interests can serve as "injury in fact" in some environmental cases – a point that petitioners do not dispute, see Pet. at 15 – and that petitioners' argument "ignores the fact that PSD permits do not remain valid indefinitely" because pollution control technology and environmental conditions can change. Opp. at 13. Petitioners, however, do not ignore this fact. To the contrary, petitioners noted (Pet. at 6 n.2) that they were required by the CAA to apply for renewal of

their permit in 2006 with updated BACT and air modeling analyses, and did so in a timely manner.[2]

To the extent that respondent is suggesting that the alleged injuries to McKasson's aesthetic and recreational interests derive from a possible incremental difference in the emission limitations in the 2001 permit and a hypothetical new permit, respondent fails to refute petitioners' showing that it has never established either how the IEPA would set the emission limitations in a new permit or that any incremental tightening of the emission limitations would be perceptible to McKasson, much less eliminate her aesthetic and recreational concerns. See Pet. at 21-22. Respondent has the burden of proof to establish injury in fact and all of the other elements of standing, see *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Here, respondent has failed to meet this burden and has proffered nothing more than McKasson's "subjective apprehensions" that she would suffer cognizable injury as a result of the emission limitations in the 2001 permit.[3]

As a result, the instant citizen suit is nothing more than an impermissible collateral attack on the 2001

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[2] Respondent does not dispute that petitioners represented to the courts below that the proposed plant was designed "'to produce emissions below permitted levels.'" *See* Pet. at 16 n.6 (quoting Pet. App. 11a). Petitioners represented to IEPA and to the court of appeals at oral argument (and continue to maintain) that the renewal PSD permit emission standards would equal or surpass (*i.e.*, be lower than) the limits on *every* regulated emission, compared to *any* CFB power plant permitted in the United States, thus making this power plant the cleanest, state-of-the-art CFB coal-fired, baseload power plant in the nation.

[3] Respondent does not dispute that McKasson "did not learn about this case until after the Sierra Club filed suit." Opp. at 12.

permit decision. Pet. at 17-18. Respondent does not dispute that other federal courts have held that CAA citizen suits cannot be used to bring collateral attacks against the substance of state-issued permits, see *id.* at 17, but asserts that here "there is no existing permit to attack." Opp. at 14. This is incorrect. IEPA has never revoked the 2001 permit. To the extent that respondent is relying on the lower courts' determination that the permit has expired, this reasoning is circular. Petitioners are making the threshold argument that the lower courts had no jurisdiction to decide any issue raised by respondent's suit and, therefore, no jurisdiction to decide that issue in the first place. See *United States* v. *$557,933.89, More or Less, in U.S. Funds*, 287 F.3d 66, 78 (2nd Cir. 2002) ("Standing is a question that determines whether the claimant may properly invoke the jurisdiction of the federal courts to determine the merits of the underlying dispute, and it therefore logically *precedes*, not follows, that determination.").[4]

2. Petitioners next demonstrated that the court of appeals misapplied this Court's standing decisions in holding that respondent satisfied the causation

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[4] There is no merit to respondent's contention (Opp. at 12 n.5) that this Court would have to remand if it held that McKasson lacks standing because the lower courts did not address the possible standing of another Sierra Club member, Verena Owen. Respondent does not refute petitioners' showing that Ms. Owen's claim of injury in fact was far weaker than Ms. McKasson's claim because Ms. Owen merely asserted that she lived approximately 350 miles away from the proposed plant and was concerned about the allegedly diffuse effects of the plant's emissions on air quality. *See* Pet. at 10 n.4. Accordingly, if this Court were to hold that McKasson lacks standing, then it surely would conclude that Ms. Owen lacks standing and there would be no need for a remand.

requirement. Pet. at 18-19. Petitioners showed that there was a disconnect in the courts of appeals' causation analysis because it found that the alleged injury to McKasson's aesthetic and recreational interests was traceable to IEPA's issuance of the PSD permit in the first place with the specified emission limitations, which is not the conduct that respondent has challenged here. See *id.* at 15 (noting that respondent has not challenged any aspect of IEPA's actions in approving the 2001 permit).

Respondent fails to address this point and, therefore, fails to refute petitioners' showing that the court of appeals' analysis is inconsistent with this Court's requirement that a plaintiff demonstrate "a causal connection between the injury *and the conduct complained of.*" *Lujan*, 504 U.S. at 560 (emphasis added).

3. Finally, petitioners demonstrated that the court of appeals ignored this Court's standing decisions by improperly relying on a chain of speculative inferences to conclude that the injunction respondent seeks would redress McKasson's alleged injuries. Pet. at 19-24; see *Summers* v. *Earth Island Inst.*, 129 S. Ct. 1142, 1150 (2009) (rejecting theory of Article III injury that required multiple assumptions). Specifically, petitioners demonstrated that the court of appeals' finding of redressability improperly rested on several speculative inferences, including that a new permit would have more stringent emission standards and that these standards would alleviate McKasson's alleged injuries. Pet. at 20-22.

Respondent attempts to sidestep this issue by arguing that "little additional analysis is necessary" and repeating the Seventh Circuit's unsupported conclusion that technological improvements "guarantee that a new permit would impose more stringent

pollution emission standards." Opp. at 15. Self-serving conclusory assertions, however, fail to rebut petitioners' specific showings that the court of appeals ignored that (1) the determination of emission limitations under the governing BACT standard is a highly individualized, case-by-case inquiry; (2) this Court's decisions do not permit federal courts to speculate that state policymakers will make a particular decision in the future to establish standing; and (3) this Court's decision in *Summers* requires federal courts to base standing determinations on individualized proof rather than general trends or statistical probabilities. See Pet. at 20-21. Respondent simply fails to address or defend the court of appeals' clear departure from this Court's decisions.

Respondent likewise fails to respond to petitioners' showing (*id.* at 21-22) that the court of appeals' finding of redressability was based on the additional speculative inferences that (1) any incremental reduction in emission levels from a new permit would be perceptible to McKasson; and (2) any such reduction would be of sufficient magnitude to eliminate or reduce McKasson's aesthetic and recreational concerns. Both inferences are matters of pure conjecture. As a result, the Seventh Circuit's finding of redressability here simply cannot be reconciled with this Court's holding in *Lujan* that it is the plaintiff's burden to establish that it is "*likely*, as opposed to merely *speculative*, that the injury will be redressed by a favorable decision," 504 U.S. at 561 (internal quotation marks omitted; emphases added), and its holding in *Summers* that standing cannot be based on a chain of speculation.

Respondent also argues that the district court's injunction provides its members with temporary

redress. Opp. at 16. This argument merely highlights respondent's interest in achieving delay and the short-sighted nature of its litigation strategy. The generation of electricity by this power plant would drive from the marketplace at least one highly polluting, more than 40 year-old coal-fired power plant that was grandfathered in by the CAA. IEPA has the expertise to evaluate the compensating environmental protection arising from this replacement. Neither Sierra Club nor the federal courts are so equipped. Therefore, by delaying or preventing petitioners' environmentally-sound plant from being built, respondent may well be creating a situation whereby the citizens of Illinois, including respondent's members, will be forced to get their power – either now or later – from sources that are less environmentally sound, and at higher prices.[5]

II. THE COURT OF APPEALS' STANDING RULING POSES AN ISSUE OF FUNDAMENTAL IMPORTANCE.

Petitioners also demonstrated (Pet. at 24-27) that the court of appeals' dilution of this Court's standing principles in the context of CAA citizen suits presents a recurring and important question of federal law because it threatens to chill power plant builders from pursuing projects that are critical to serving our nation's increasing energy needs.[6] The decision

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[5] Respondent's assertion (Opp. at 2) that petitioners "no longer press their objection to the district court's conclusion that their permit has expired" is incorrect. Petitioners' position is that the permit has not expired and that the district court's conclusion to the contrary is invalid because it had no Article III jurisdiction to decide that issue. IEPA has not yet made a final determination on the expiration issue.

[6] *See* Nat'l Energy Policy Dev. Group, *National Energy Policy*, 1-5 (May 2001), *available at* http://www.pppl.gov/common_pics/

below also contributes to the growing trend of private groups performing an enforcement and even prosecutorial role with respect to environmental permits – at the expense of publicly accountable government officials.

Respondent does not deny either of these consequences. Instead, respondent asserts that petitioners are merely arguing "for repeal of the Clean Air Act's citizen-suit provision." Opp. at 16. This argument is wide of the mark. Petitioners have no quarrel with the availability of citizen suits or the remedies that the CAA provides.

Petitioners' argument is that this case presents an important question of federal standing law because the decision below eviscerates constitutional principles that this Court has established to ensure that federal courts – which are courts of limited jurisdiction – entertain suits only when the plaintiffs demonstrate actual, non-speculative injury that is redressable by the relief sought. These standing principles apply to all suits, including CAA citizen suits. See *Raines* v. *Byrd*, 521 U.S. 811, 820 (1997) (refusing to relax Article III standing principles "for the sake of convenience and efficiency"). Here, however, the Seventh Circuit abandoned this Court's standing principles and allowed a CAA citizen suit to go forward in circumstances where the plaintiff organization failed to show that one of its members would suffer a cognizable injury under the existing permit or that a new permit would redress the alleged injury – thereby facilitating suits that will

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national_energy_policy/national_energy_policy.pdf (noting that "[a] pressing long-term electricity challenge is to build enough new generation and transmission capacity to meet projected growth in demand"); *see also id.* at 1-15 ("Illinois consumers are reeling from high heating and cooling costs.").

chill the construction of much-needed and environmentally-sound power facilities.[7] The court of appeals' departure from Article III standing principles in the CAA citizen-suit context therefore presents an important question of federal law that only this Court – and not Congress – can address.

Finally, respondent misses the point in asserting (Opp. at 17-18) that this is not an instance in which private enforcement of the environmental laws has supplanted public enforcement because petitioners can file a new permit. Petitioners have been enjoined from building under the existing permit, even though the responsible public agency has never revoked the permit or ruled that it has expired. Respondent suggests (*id.* at 18 n.7) that nothing "in the record" supports petitioners' "speculation" that the IEPA has not ruled because it is "defer[ring]" to this litigation, but petitioners submit that the record speaks for itself. Nothing respondent says negates the plain fact that IEPA commenced a review of the site construction and the construction contract, pursuant to sections 113(c) and 114 of the CAA, so that IEPA could make its own final determination. For four years, faced with the Sierra Club lawsuit, IEPA has demonstrably been chilled from completing its statutorily-prescribed mission of making a final determination on the validity of the permit. The precedent that would be set by allowing citizen-suit plaintiffs, with the aid of the federal courts, to interrupt the PSD construction permit process and usurp the authority of a constitutionally-appointed

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[7] *See Statement by the President on the Budget* (Mar. 17, 2009), *available at* http://www.whitehouse.gov/the_press_office/Statement-by-the-President-on-the-Budget (noting the national priority to invest in "clean energy," including "clean coal" technology).

agency is not only dangerous and in violation of public policy and statute, but it is fundamentally unconstitutional.

CONCLUSION

For the foregoing reasons, and for those presented in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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